

**CLERK'S COPY.**

**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1922**

**No. 388**

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**THE STATE OF WASHINGTON, PLAINTIFF IN ERROR,**

**vs.**

**W. C. DAWSON & CO.**

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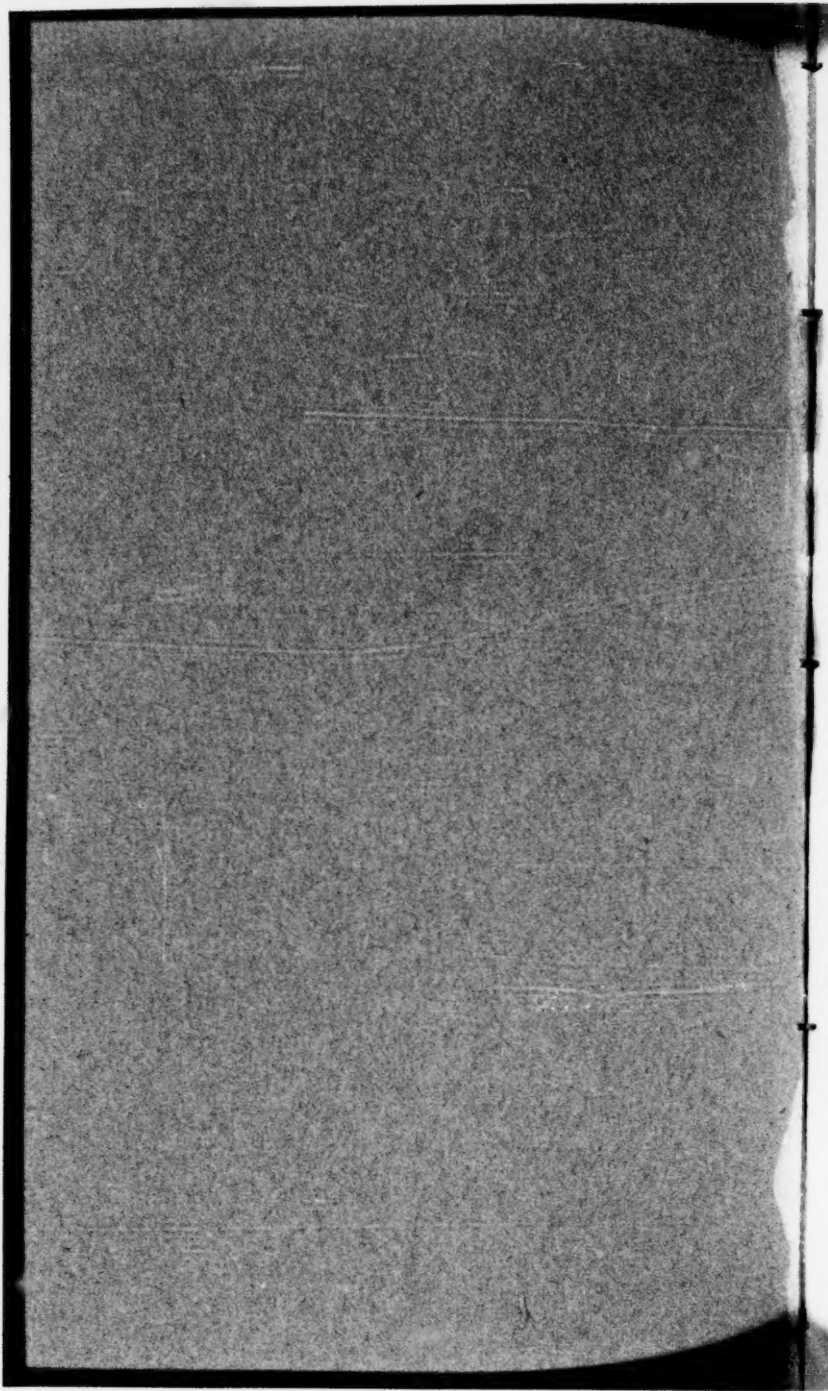
**IN ERROR TO THE SUPREME COURT OF THE STATE OF  
WASHINGTON**

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**FILED JUNE 11, 1923**

**(29,676)**





(29,676)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 366

THE STATE OF WASHINGTON, PLAINTIFF IN ERROR,

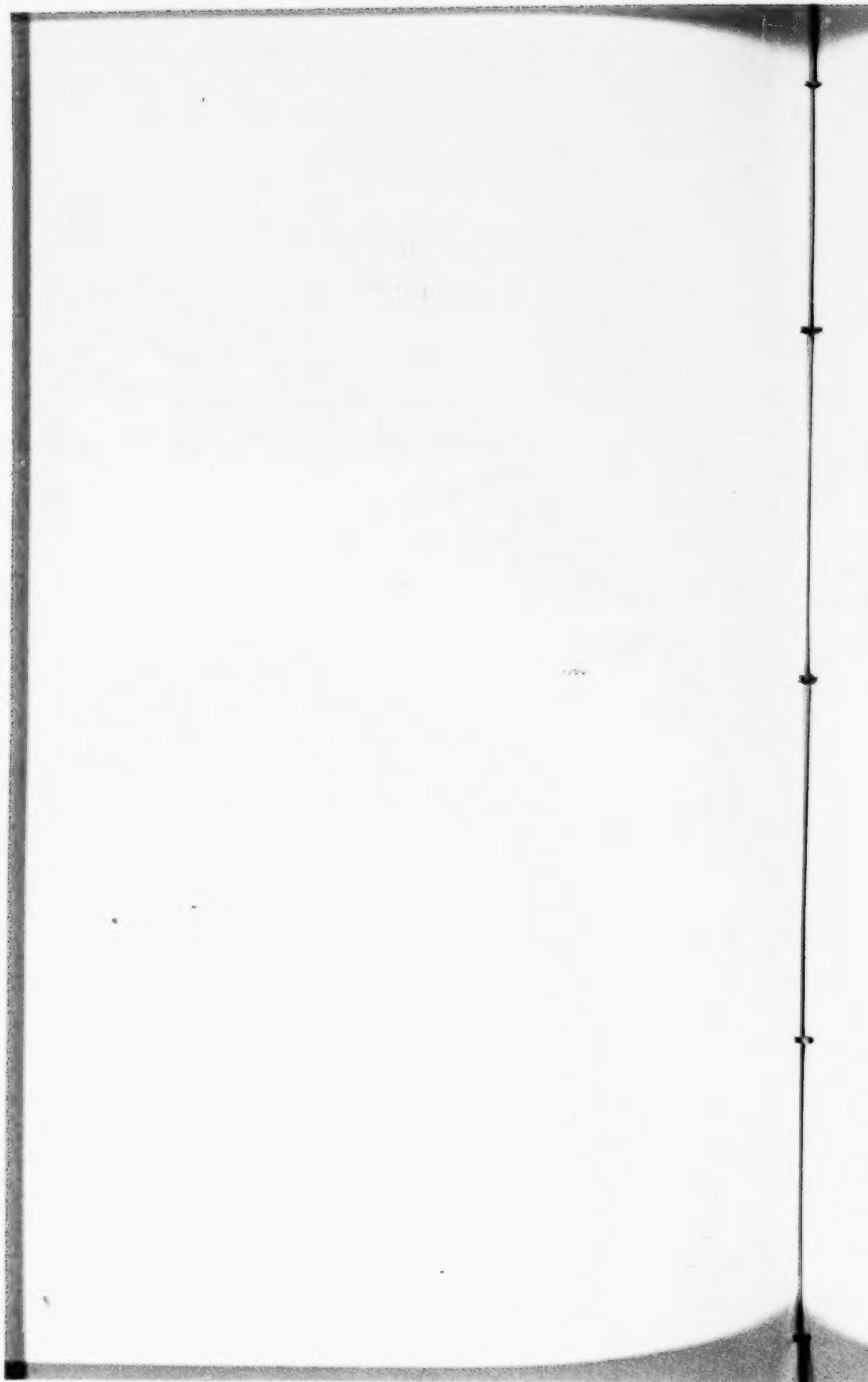
*vs.*

W. C. DAWSON & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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[fol. 1]

IN THE

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR  
KING COUNTY**

No. 161,228

THE STATE OF WASHINGTON, Plaintiff,

v.

W. C. DAWSON &amp; Co., a Corporation, Defendant

COMPLAINT—Filed Sept. 6, 1922

Comes now the plaintiff, and for a cause of action against the defendant, alleges as follows:

I. That during all the times hereinafter mentioned, the defendant was a corporation duly organized under the laws of the state of Washington.

II. That defendant was engaged from June 10, 1922 to July 31, 1922, in the business, industry or operation of stevedoring in the county of King, State of Washington.

III. That under and by virtue of and in accordance with the provisions of chapter 74, Laws of Washington for 1911 and amendatory acts thereto, the said business, industry or operation of stevedoring is classified for the purpose of determining the amount of its contribution to the accident fund created by said law under Class 42, That on the 7th day of November 1921, the industrial insurance department created by the law aforesaid, acting pursuant to authority vested in it, passed a resolution determining and establishing a percentage for the business, industry or operation of stevedoring, and fixing the same at one and one-half per cent, of the total amount of the payroll for workmen engaged in said business, industry or operation of stevedoring in the extra hazardous employment or departments thereof, a copy of which resolution is hereto attached, marked "Exhibit A," and by this reference made a part of this complaint.

[fol. 2] IV. That on June 10, 1922, the Congress of the United States of America passed an act amending section 24 and section 256 of the Judicial Code, which read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the

workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the Condemnation of property taken as prize; Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States.

"Sec. 2. That clause 3 of section 256 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States."

For the period from June 10, 1922 to July 31, 1922, inclusive, defendant was engaged in the business, industry or operation of stevedoring, as aforesaid. The actual amount of his payroll for workmen employed by him in that business, industry or operation in the extra hazardous employment or departments thereof, for said [fol. 3] period, was the sum of \$14,096.80. There therefore became due and owing from defendant to the plaintiff under the provisions of the aforesaid law and the aforesaid resolution of November 7, 1921, a premium or payment for the accident fund at the rate of one and one-half per cent. upon said sum of \$14,096.80, or a premium of \$211.45. That on or about August 16, 1922, plaintiff demanded said defendant to pay the sum of \$211.45, above mentioned, but that defendant failed and refused to pay the same, and ever since has so failed and refused. That by reason of the foregoing facts, there became due and owing from defendant to plaintiff for said accident fund, the sum of \$211.45, no part of which has been paid, and all of which is justly due, owing and payable as aforesaid.

V. That the business of operation of stevedoring is, in fact, extra hazardous.

VI. That during all of the times hereinbefore mentioned, all workmen so employed by said defendant in said business of stevedoring, were at all times during said employment working on board ships afloat in the navigable waters of Puget Sound and in the State of Washington, and that none of said workmen were masters or members of crews of said ships, or any of them, or of any ships whatever.

Wherefore plaintiff demands judgment against the defendant in the sum of \$211.45, together with its costs and disbursements herein.

L. L. Thompson, Attorney General. John H. Dunbar, Assistant Attorney General, Attorneys for Plaintiff.

[fol. 4] Affidavit of J. F. Heemans above paper omitted in printing.

#### "EXHIBIT A" TO COMPLAINT

Olympia, Washington, November 7, 1921.

The Administrative Board of the Industrial Insurance and Safety Divisions of the Department of Labor and Industries held a meeting in the office of the Director in the Insurance Building at Olympia, Washington, today, the following members being present:

Edward Clifford, Director.

E. S. Gill, Supervisor of Industrial Ins.

H. L. Hughes, Supervisor of Safety.

Moved by Supervisor Gill that the following changes in classification and rates be made effective January 1, 1922:

Class 42:

42-1. Wharf operations,  $1\frac{1}{2}\%$  E.

Longshoring,  $1\frac{1}{2}\%$  E.

Motion carried, all present voting aye.

I, Frances Whiting, being the duly qualified and acting secretary of the Department of Labor and Industries do hereby certify that the attached is a true and correct copy of excerpts of minutes of November 7, 1921.

Frances T. Whiting, Secretary of Department of Labor and Ind.

[File endorsement omitted.]

Assigned to Department No. 3. Austin E. Griffiths, Presiding Judge.

[fol. 6] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Title omitted]

DEMURRER—Filed Sept. 13, 1922

Comes now the above named defendant by its attorneys Cosgrove & Terhune, and demurs to plaintiff's complaint herein on the following grounds:

I. That said complaint does not state facts sufficient to constitute a cause of action.

II. That the Act of June 10, 1922, of the Congress of the United States of America referred to in paragraph IV of plaintiff's complaint is repugnant to and in conflict with section 2, Article 3, of the Constitution of the United States of America, and therefore of no force and effect.

Cosgrove & Terhune, Attorneys for Defendant.

Copy of within Demurrer received and due service of same is acknowledged this 7 day of Sept., 1922.

L. L. Thompson, John H. Dunbar, Attorney- for Plaintiff.

[File endorsement omitted.]

[fol. 7] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR  
KING COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed Sept. 13, 1922

This cause coming on regularly before the court this 13th day of September, 1922, upon the demurrer of the above named defendant, all parties appearing by their respective counsel and the cause having been submitted to the court,

It is hereby considered, ordered, adjudged and decreed, that the defendant's demurrer be, and the same is hereby sustained.

To which ruling the plaintiff excepted, and the same is hereby allowed.

Done in open court this 13th day of September, 1922.

Mitchell Gilliam, Judge.

O. K. as to form. L. L. Thompson, John H. Dunbar, Atts. for Plaintiff.

[File endorsement omitted.]

[fol. 8] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR  
KING COUNTY

[Title omitted]

ORDER OF DISMISSAL—Filed Sept. 13, 1922

This cause coming on regularly before the court this 13th day of September, 1922, on the application of the defendant for a dismissal of said action;



And it appearing to the court that it has heretofore sustained the said defendant's demurrer to plaintiff's complaint;

And it further appearing to the court that said plaintiff has refused to plead further;

Now therefore, it is

Considered, ordered, adjudged and decreed by the Court that said action be, and the same is hereby dismissed.

Done in open court this 13th day of September, 1922.

Mitchell Gilliam, Judge.

O. K. as to form. L. L. Thompson, John H. Dunbar, Atts. for Plaintiff.

[File endorsement omitted.]

[fol. 9] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR  
KING COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Sept. 13, 1922

To the above named defendant, W. C. Dawson & Co., and to Cosgrove & Terhune, its attorneys:

You, and each of you, are hereby notified that the above named plaintiff, The State of Washington, does hereby appeal to the Supreme Court of the State of Washington, from that certain final judgment entered in the above entitled court and cause on the 13th day of September, 1922, and from each and every part thereof, the same being a judgment dismissing plaintiff's action.

L. L. Thompson, Attorney General. John H. Dunbar, Assistant Attorney General, Atts. for Plaintiff.

Service of the above Notice of Appeal by receipt of a copy thereof is hereby admitted this 13th day of September, 1922.

Cosgrove & Terhune, Attys. for Defendant.

[File endorsement omitted.]

[fol. 10]

# CLERK'S CERTIFICATE

STATE OF WASHINGTON,  
County of King, ss:

I, George A. Grant, County Clerk, of King County and ex-officio Clerk of the Superior Court of the State of Washington in and for King County, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in cause No. 161228, entitled The State of Washington vs. W. C. Dawson & Co.,

a corp., as I have been directed by the Respondent to transmit to the Supreme Court of the State of Washington.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 15th day of September, 1922.

George A. Grant, County Clerk, etc., By W. T. Hatt, Deputy Clerk. [Seal of Superior Court of King County, Wash.]

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[fol. 11] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

OPINIONS—Filed Feb. 16th, 1923

PER CURIAM: The opinion of the department which first heard this case is reported in 22 Wash. Dec. 355, — Pac. —. After the opinion was filed a petition for rehearing was presented, in which our attention was called for the first time to the case of the State Industrial Commission of the State of New York v. Nordenholt Corporation, U. S. Supreme Court Advance Opinions, No. 16, July 1, 1922, page 567. Upon the argument, when the case was heard En Banc, it was suggested that the statement in the opinion, to the effect that the work of a stevedore is maritime in its nature and a matter within the admiralty jurisdiction of the United States, was too broad, because it did not seem to recognize the two classes of stevedores. It appears that there are stevedores whose work is upon the dock or wharf, and also those whose work is upon the boat. The latter are sometimes called "water stevedores." The question whether the stevedores who work upon the dock may be brought within the workmen's compensation act of this state is not involved in this case. The question here has to do solely with those who work upon the water, and which work is maritime in its nature; and the rights and liabilities connected therewith are matters which are within the admiralty jurisdiction of the United States. The department opinion must be understood as referring only to those stevedores who work upon the boat. The case of State Industrial Commission v. Nordenholt Corporation, supra, is not out of harmony with the views expressed in the department opinion. In that case the question was whether a longshoreman working upon a dock was within the workmen's compensation act of the state of New York, and it was there held that he was under such act. That case is distinguishable from the one now before us because there the stevedore was working upon the dock, while here the attempt is to bring within the workmen's compensation act of this state those are working upon the water and whose work is therefore maritime in its nature. The stevedore who works upon the dock has a common law right of action which may be withdrawn and he required to take under the workmen's compensation act. The stevedore who works upon the boat or upon the water does not have a common law right of action which may be withdrawn and he be required to take under a compensation act. In the case above cited it is said:

"When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

The holding in the department opinion is adhered to and the judgment is affirmed.

[fol. 13]

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON, JANUARY SESSION,  
A. D. 1923

JUDGMENT

Be it remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of January, A. D. 1923, it being the Eighth day of said month, among other, the following was had and done, to-wit:

Friday, February 16, 1923.

No. 17564

STATE OF WASHINGTON, Appellant,

vs.

W. C. DAWSON & Co., Respondent

Judgment

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 16th day of February, A. D. 1923, on motion of Cosgrove & Terhune of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said W. C. Dawson & Company have and recover of and from the said State of Washington the costs of this action taxed and allowed at Fifty-eight & 65/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 14]

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Mar. 13, 1923

To the Honorable John F. Main, Chief Justice of the Supreme Court of the State of Washington:

The petition of the State of Washington respectfully shows that heretofore, to-wit, on the 13th day of September, 1922, there was tried in the superior court of King County, of the state of Washington, a case in which W. C. Dawson & Co. was defendant, and your petitioner was plaintiff. The declaration of the plaintiff in said case was an action instituted for the purpose of collecting premiums by virtue of the Workmen's Compensation Act of the state of Washington, on the payroll of workmen employed by the defendant who were stevedores engaged in stowing away the cargo of vessels lying on the navigable waters of Puget Sound within the boundaries of the state of Washington.

Upon the trial of said case in the superior court of King County, state of Washington, the defendant demurred to plaintiff's complaint on the ground, first, that the said complaint does not set out facts sufficient to constitute a cause of action, and second, that the act of June 10, 1922, of the Congress of the United States of America, referred to in paragraph IV of plaintiff's complaint, is repugnant to and in conflict with section 2, article III of the Constitution of the United States of America, and therefore of no force and effect.

The action of your petitioner was based on an act of Congress [fol. 15] amending sections 24 and 256 of the Judicial Code, approved June 10, 1922. Said demurrer was sustained by said court and thereupon there was a judgment in said cause by said court in favor of defendant and against your petitioner and dismissing your petitioner's said action. Whereupon your petitioner took an appeal to the supreme court of the state of Washington, that being the highest court of law or equity of the said state in which a decision could be had in said case, assigning therein as error the sustaining of said demurrer in said case by the said superior court of King County, of the state of Washington, and the judgment of said court dismissing said case in favor of the defendant.

The second ground of said demurrer is set out verbatim supra, and your petitioner shows that this ground raised and presented a federal question in said case, namely, first, whether the act of Congress amending sections 24 and 256 of the Judicial Code, approved June 10, 1922, is repugnant to and in conflict with section 2, article III of the Constitution of the United States of America, and therefore of no force and effect.

At the October term of the supreme court of the state of Washington, the appeal and its accompanying record came on to be heard and was argued in said supreme court and on the 20th day of

December, 1922, the said supreme court rendered its final judgment thereon, affirming the judgment of the court below, namely, the superior court of King County, for the state of Washington. On December 21, 1922, in conformity with the rules of court, your petitioner filed a petition for a rehearing in the above entitled case, which was, by the supreme court of the state of Washington, granted, and at the January term of the supreme court of the state of Washington, this cause was again argued and heard by the supreme court of the state of Washington en banc on January 26, 1923, and on [fol. 16] February 16, 1923, the said supreme court rendered its final judgment en banc, adhering to its former opinion of December 20, 1922, and affirming the judgment of the court below, namely, the superior court of King county, for the state of Washington.

Your petitioner further shows that said judgment of said supreme court was and is a final judgment in the highest court in the state of Washington in which a decision in said suit could or can be had.

Petitioner further shows that a federal question was made in said case, to-wit, as hereinbefore set out, and that said judgment of said supreme court was repugnant to and in conflict with the laws of the United States, and that said judgment of said supreme court was contrary thereto, and that a decision of said federal question was necessary to the judgment rendered, and that in said action, rights and privileges were claimed by your petitioner under the statutes of the United States and that the decision of this court was against the rights and privileges set up and claimed under said statutes of the United States.

Wherefore your petitioner prays that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the supreme court of the United States, and prays that a writ of error to said supreme court be allowed, that citation be granted and signed, that the bond herewith presented be approved, that the errors complained of may be reviewed in the supreme court of the United States, and the judgment aforesaid of said supreme court of the state of Washington be reversed.

The State of Washington, By its Attorneys, L. L. Thompson, Attorney General of the State of Washington; John H. Dunbar, Assistant Attorney General of the State of Washington, [fol. 17] Attorneys and Counsel for Petitioner.

Copy of within Petition received and due service of same is acknowledged, this 9 day of Mar., 1923.

Cosgrove & Terhune, Attorneys for Respondent.

[fol. 18] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Mar. 13, 1923

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Washington erred to the grievous injury and wrong of the appellant in said cause, and to the prejudice and against the rights of plaintiff in error herein in the following particulars, to-wit:

I. The court erred in directing the sustaining of the demurrer of respondent in said Supreme Court, the defendant in error herein, to the complaint.

II. The court erred in entering judgment in said action against the appellant in said Supreme Court, the plaintiff in error herein, and dismissing its action.

III. The court erred in holding that the appellant in the Supreme Court, the plaintiff in error herein, had no right to collect from an employer engaged in the business of stevedoring a percentage of his payroll as premiums by virtue of the Workmen's Compensation Act of the State of Washington.

IV. The court erred in holding that the amendments to section 24 and section 256 of the Judicial Code approved by Congress on [fol. 19] June 10, 1922, was unconstitutional in that it is repugnant to and in conflict with section 2, article 3, of the Constitution of the United States of America, and therefore of no force and effect.

V. The court erred in not reversing the judgment of the superior court of King County of the State of Washington, and granting to the said appellant therein, the plaintiff in error herein, rights and privileges claimed therein under and by virtue of the amendments to section 24 and section 256 of the Judicial Code approved by Congress on June 10, 1922.

L. L. Thompson, Attorney General; John H. Dunbar, Assistant Attorney General, Attorneys for Plaintiff in Error.  
Office and Post Office Address: Temple of Justice, Olympia, Washington.

Copy of within Assignments of Error received and due service of same is acknowledged, this 9 day of March, 1923.

Cosgrove & Terhune, Attorneys for Defendant.



[fol. 20] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

BOND OF WRIT OF ERROR—Filed Mar. 13, 1923

Know all men by these presents: That we, the State of Washington, as principal, and American Surety Co. of New York, as surety, are held and firmly bound unto W. C. Dawson & Co., a corporation, in the sum of One Thousand (\$1,000) Dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13 day of March, 1923.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Washington;

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

State of Washington, By John H. Dunbar, Asst. Atty. Gen.,  
Principal. American Surety Company of New York, By  
J. H. Brown, Resident Vice President, Surety. Attest:  
R. W. Price, Resident Assistant Secretary. (Seal.)

[fol. 21] THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Mar. 13, 1923

The above entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

John F. Main, Chief Justice of the Supreme Court of the State of Washington.

Copy of within Order received and due service of same is acknowledged, this 9 day of March, 1923.

Cosgrove & Terhune, Attorneys for Respondent.

[fol. 22]

[File endorsement omitted]

WRIT OF ERROR—Filed Mar. 15, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you at the January term 1923 thereof, being the highest court of law or equity of said state in which a decision could be had in said suit between the State of Washington, designated as plaintiff and appellant, and W. C. Dawson & Co., a corporation, designated as defendant and respondent, wherein rights, privileges and immunities are claimed under the constitution and statutes of the United States, and the decision was against the rights and privileges specially set up and claimed under such United States statutes, a manifest error hath happened to the great damage of the said State of Washington as by its complaint appears, we being willing that error, if any hath been made, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid be inspected that said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of [fol. 23] said Supreme Court, the 14th day of March, in the year of our Lord, 1923.

Done in the City of Tacoma and County of Pierce, with the seal of the District Court of the United States for the Western District of Washington, Southern Division, attached.

F. M. Harshberger, Clerk, By Ed. M. Lakin, Deputy Clerk of the District Court of the United States for the Western District of Washington, Southern Division. [Seal of the United States District Court, Western District of Washington.]

Allowed by John F. Main, Chief Justice of the Supreme Court of the State of Washington.

Copy of within Writ received and due service of same is acknowledged, this 9 day of March, 1923.

Cosgrove & Terhune, Attorneys for Deft. in Error.

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[fol. 24] CITATION—Filed Mar. 13, 1923; omitted in printing

Copy of within Citation received and due service of same is acknowledged, this 9 day of Mar., 1923.

Cosgrove & Terhune, Attorneys for Deft. in Error.

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[fol. 25] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

#### CLERK'S CERTIFICATE

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I have been directed by a præcipe on file to certify to the Supreme Court of the United States,

And I further certify that in pursuance of the writ of error heretofore filed in this court I herewith transmit said transcript, together with the original writ of error and the original citation to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 18th day of April, 1923.

C. S. Reinhart, Clerk. [Seal of the Supreme Court, State of Washington.]

Endorsed on cover: File No. 29,676. Washington Supreme Court. Term No. 366. The State of Washington, plaintiff in error, vs. W. C. Dawson & Co. Filed June 11th, 1923. File No. 29,676.

CLERK'S COPY.

WARRANT OF ARREST

SUPREME COURT OF THE UNITED STATES

COMMENCED HEREIN 1923

No. 994

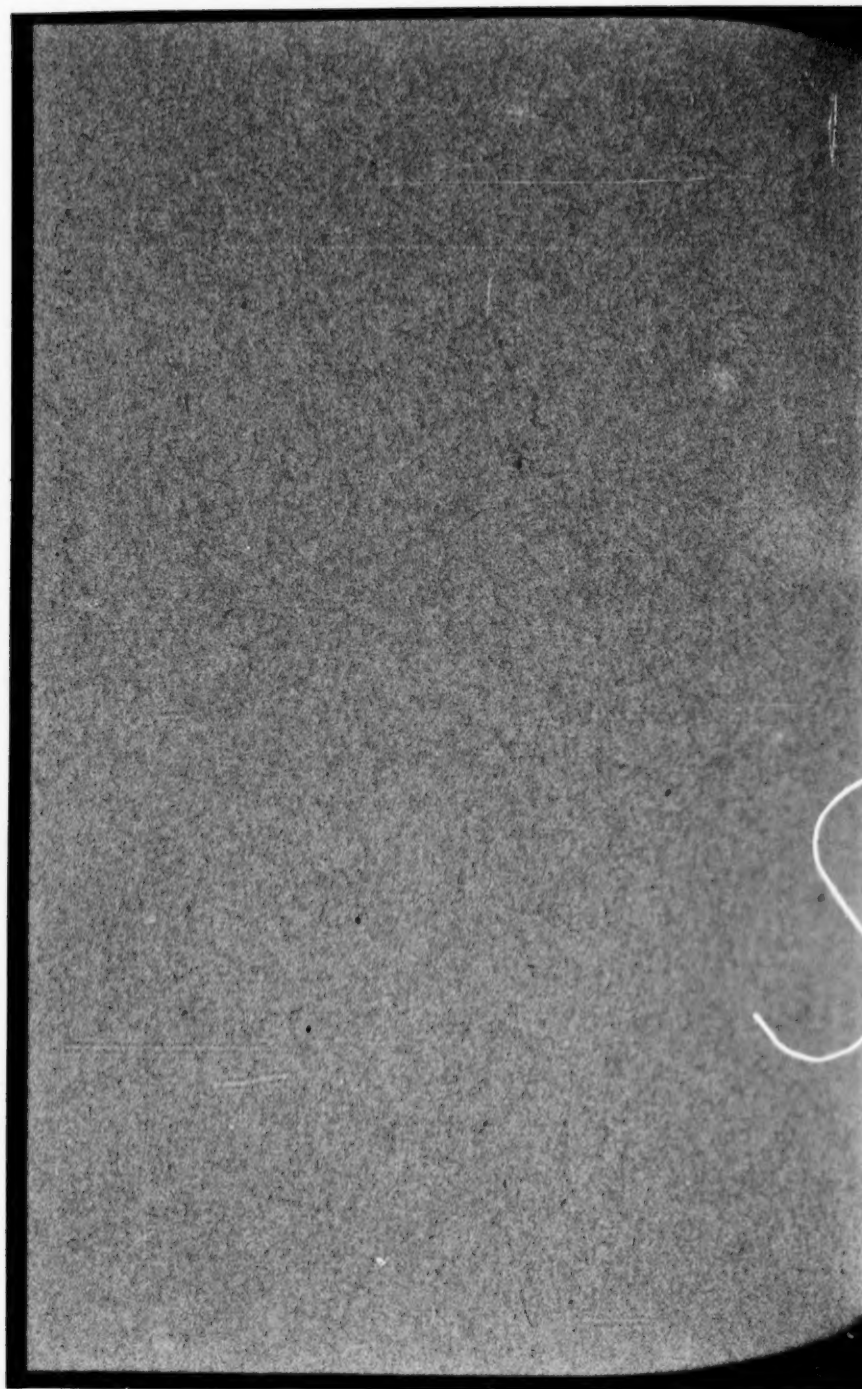
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF  
CALIFORNIA AND JOSEPH HAYES THOMAS HAYES,  
ET AL., ETC, PLAINTIFFS IN ERROR,

JAMES ROLFE COMPANY AND GENERAL ACCIDENT,  
FIRE AND LIFE ASSURANCE CORPORATION, LIM-  
ITED

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED DECEMBER 4, 1923

(29,994)



(29,994)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 884

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF  
CALIFORNIA AND JOSEPH HAYES, THOMAS HAYES,  
ET AL., ETC., PLAINTIFFS IN ERROR,

v8.

JAMES ROLPH COMPANY AND GENERAL ACCIDENT,  
FIRE, AND LIFE ASSURANCE CORPORATION, LIM-  
ITED

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN THE

# **SUPREME COURT OF THE STATE OF CALIFORNIA**

---

**JAMES ROLPH COMPANY and GENERAL ACCIDENT, FIRE AND LIFE  
ASSURANCE CORPORATION, LTD., a Corporation, Petitioners,**

**vs.**

**INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA  
and Joseph Hayes, Thomas Hayes, Helen Hayes, and Mary Hayes,  
by Mary Lordan, Guardian of their Persons and Estates, Respondents**

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**PETITION FOR WRIT OF REVIEW—Filed Aug. 16, 1923**

To the Honorable Supreme Court of the State of California:

The petitioners above named respectfully pray for a writ of review by this their verified petition and in this behalf set forth the following facts and causes for the issuance of the writ, viz:

1. That your petitioner, General Accident, Fire and Life Assurance Corporation, Ltd., now is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland and lawfully engaged therein and in the State of California in the business of employers' liability and workmen's compensation insurance and at the time of the alleged accident to Eugene Hayes, hereinafter referred to, was the insurer of petitioner James Rolph Company, a corporation, organized and existing under and by virtue of the laws of the State of California, against liability for compensation under the terms of the Workmen's Compensation, Insurance and Safety Act [fol. 2] of 1917 of the State of California.

2. That the above named respondents Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes by Mary Lordan guardian of their persons and estates filed in the office of the Industrial Accident Commission of the State of California an application for the adjustment of a claim for a death benefit by reason of the death of Eugene Hayes asserted by them under the Workmen's Compensation, Insurance and Safety Act of 1917. Your petitioners denied that they were entitled to workmen's compensation or a death benefit under said act upon the ground, (a) that the Industrial Accident Commission has no jurisdiction over said claim; (b) that said applicants had no claim under the Workmen's Compensation, Insurance and Safety Act of 1917; (c) that any claim applicants may have is one of admiralty and maritime jurisdiction over which the Industrial Accident Commission has no jurisdiction; (d) that the amendatory act

of June 10, 1922 amending Sections 24 and 256 of the Judicial Code purporting to give the Industrial Accident Commission jurisdiction of said claim is unconstitutional.

3. That thereafter said application came on for hearing before the Industrial Accident Commission and evidence was taken by a referee appointed by it. The undisputed testimony is as follows:

Eugene Hayes was a stevedore. At the time of his death he was in the temporary employ of the defendant below, James Rolph Company, which company was among other things an importer of coal. On September 5, 1922 Hayes was engaged in his capacity as stevedore upon the vessel, "West Islip," which was discharging a cargo of coal brought by it from Newcastle, New South Wales to San Francisco [fol. 3] cisco and consigned to the James Rolph Company. The vessel was moored to Pier 15 one of the piers in the navigable waters of San Francisco Bay and the cargo of coal was being unloaded from the hold of the vessel by stevedores of which Hayes was one. On the morning of September 5, 1922 Hayes had arrived upon the vessel but before going below to the hold where he was working he secured an iron plate used in the unloading work and in throwing the plate below became overbalanced and fell into the hold of the vessel sustaining injuries from which he later died. The findings of the Industrial Accident Commission relative to the accident are as follows:

"1. Eugene Hayes, while employed as a stevedore on September 5, 1922, at San Francisco, California, by defendant James Rolph Company, sustained injury occurring in the course of and arising out of his employment as follows: Fell into hold Number Two of the Steamship "West Islip," thereby fracturing his skull, said injury proximately causing his death the same day \* \* \*.

2. At said time the "West Islip" was discharging a cargo of coal which it had carried from Newcastle, New South Wales, to Pier 15, one of the piers in the navigable waters of San Francisco Bay, which said cargo had been consigned to defendant James Rolph Company.

Briefly, then, the facts are that at the time of the accident the deceased was employed as a stevedore upon a vessel engaged in international commerce unloading a cargo, brought from a foreign port to San Francisco, from the vessel while it was docked at a pier in the navigable waters of San Francisco Bay.

4. That after the submission of the case the Industrial Accident Commission, on May 31, 1923, made and filed its findings and award in favor of the applicants below, for a death benefit amounting to a sum of three thousand nine hundred (\$3,900.00) dollars. Within twenty (20) days thereafter the defendants below filed an application for a rehearing upon the following grounds:

(a) That the Commission acted without and in excess of its [fol. 4] powers;

(b) That the evidence did not justify the findings of fact;

(c) That the findings of fact did not support the award.

And in said petition for a rehearing, your petitioners fully and particularly set forth the grounds upon which they claimed that said Commission acted without and in excess of its powers, and that the findings of fact did not support the order, decision and award, and that the evidence did not justify the findings of fact. Said petition for a rehearing was denied on the 18th day of July, 1923.

5. That unless said award is set aside by this court it will be enforced against your petitioners under a writ of execution upon a judgment which will be entered and docketed as provided in said Workman's Compensation, Insurance and Safety Act of 1917.

6. In support of this petition your petitioners aver that said Commission in rendering said decision and entering said award acted without and in excess of its powers and that the findings of fact do not support the award and that the order and decision are unreasonable. That your petitioners refer to the memorandum of points and authorities accompanying this petition in support of the grounds they urged for annulling the award of said Commission.

7. That sections 24 and 256 of the Judicial Code of the United States confer jurisdiction over the subject matter and the matters to this proceeding upon the courts of the United States and exclude the jurisdiction of the Industrial Accident Commission of the State of California. That the amendments to Sections 24 and 256 of the [fol. 5] Judicial Code approved June 10, 1922 purporting to give jurisdiction to the Industrial Accident Commission and to give claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel rights and remedies under the workmen's compensation law of any state and particularly of the State of California or of any district or territory were and are null and void and in violation of the Constitution of the United States of America and particularly in violation of Section 8 Article I of said Constitution (Congress may make necessary and proper laws for carrying out granted powers; Congress should have the power to regulate commerce with foreign nations and among the several states); and of Section 2 of Article III of said Constitution (extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction); and of Section 1 of Article XIV of the Amendments to the Constitution of the United States in that said amendments take property without due process of law and deny persons the equal protection of the laws. That your petitioners claim the benefit and protection of the aforesaid provisions of the Constitution of the United States of America.

8. That unless said award is annulled your petitioners will be deprived of their property without due process of law, in violation of Section 13 of Article I of the Constitution of the State of California, and in violation of Section 1 of Article XIV of the Amend-

ments to the Constitution of the United States of America. That your petitioners claim the benefit and protection of the aforesaid provisions of the Constitution of the State of California and of the Constitution of the United States of America.

9. That your petitioners have not the right to appeal from said [fol. 6] decision and award of said Commission and have no plain, speedy or adequate remedy other than by writ of review; that your petitioners are the parties beneficially interested in this proceeding, and that the names of the parties interested whose rights will be affected by this petition are your petitioners and the respondents herein.

10. That by the provision of said Compensation Act, your petitioners are required to make application to this court or to the District Court of Appeal in which your petitioners reside. Your petitioners apply to this court because petitioner, General Accident Fire and Life Assurance Corporation, Ltd., does not reside within any of the Appellate Districts in the State of California, and the amount involved exceeds two thousand dollars (\$2,000.00).

Wherefore, your petitioners pray:

1. That a writ of review issue out of this court to the said Industrial Accident Commission commanding it to certify fully to this Court, at a specified time and place, the record and proceedings in said cause, that the same may be inquired into and determined by this court.

2. That said matters and record be fully heard and considered by this court, and that it be ordered, adjudged and decreed that said award made by said respondent Industrial Accident Commission against your petitioners be annulled, vacated and set aside.

3. That in the meantime said respondents be required to desist from further proceeding in said matter to be reviewed, and that said Commission be required to refrain from issuing any copy, certified or otherwise, of said decision or award hereinbefore set forth, or permitting the same to be filed by any clerk of any Superior Court of the State of California, in and for any county or city and county of said state.

4. That your petitioners recover their costs herein and for such other and additional relief as may be proper and just in the premises.

James Rolph Company and General Accident Fire and Life Assurance Corporation, Ltd., By Redman & Alexander,  
Their Attorneys.

[fols. 8 & 9] Jurat showing the foregoing was duly sworn to by H. M. Hinchman omitted in printing.

[fol. 10] [File endorsement omitted.]

[fol. 11] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.  
IN BANK

[Title omitted]

ORDER ISSUING WRIT OF REVIEW—Filed Aug. 20, 1923

By the COURT:

It is ordered that a writ of review issue as prayed for herein, returnable before this court in bank, at its court room in the State Building, San Francisco, on Tuesday, September 4, 1923, at ten o'clock, A. M.

Dated August 20, 1923.

Wilbur, C. J.

[fol. 12] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
S. F. No. 10814

[Title omitted]

WRIT OF REVIEW—Filed Aug. 22, 1923

The People of the State of California to Industrial Accident Commission and Joseph Hayes, Thomas Hayes, Helen Hayes, and Mary Hayes, by Mary Lordan, Guardian of their persons and estates, respondents, Greeting:

Whereas, it has been represented to this court by the verified petition of the petitioners in the above entitled proceeding on file herein that you, the said Industrial Accident Commission, have made and rendered findings and award against said petitioners in a certain proceeding then and there pending before said Industrial Accident Commission and numbered therein No. 12688; and

Whereas, it has been further represented to this court, by said petitioners that said findings and award were and are erroneous and void for reasons set forth at length in said petition, reference thereto being hereby made; and being willing that the records and proceedings [fols. 13 & 14] in said matter, upon which said decision and award are based, and that all matters relating thereto shall be certified and returned by you to this court.

You, said Industrial Accident Commission, are hereby commanded to certify or cause to be certified and returned to this court on the 4th day of September, 1923, at ten o'clock A. M., on said day, at the courtroom of this court in the State Building, at the Civic Center in the City and County of San Francisco, a true, full and correct transcript of all papers, records, files and proceedings in the said proceeding above specified, pending before you, in your possession or under your control, in order that the same may be reviewed by this court and such action taken thereon as of right and as accord-



ing to law shall be taken and done, and that you then and there have this writ.

And pending the action of this court thereon, you, the respondents above named, are commanded and required to desist from further proceedings in said matter and to refrain from issuing or having issued any certified copy of said findings and award or permit any such copy to be filed with the Clerk of the Superior Court of the State of California, in and for any of the counties or cities and counties of said state.

Witness The Honorable Curtis D. Wilbur, Chief Justice and the Associate Justices of the Supreme Court of the State of California.

Attest my hand and the Seal of said Court this 21st day of August, A. D. 1923.

B. Grant Taylor, Clerk of said Court, By I. Erb, Deputy Clerk. (Seal.)

[fol. 15] [File endorsement omitted.]

Service of the within Writ of Review admitted this 21st day of August, 1923.

W. H. Pillsbury, By S. Edgecomb, Attorney for Respondents.

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[fol. 16] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

RETURN OF RESPONDENT INDUSTRIAL ACCIDENT COMMISSION—Filed  
Sept. 4, 1923

Respondent Industrial Accident Commission respectfully suggests to this court that the only questions presented in this proceeding are one of law involving the constitutionality of an act of Congress referred to herein, together with a question of law now under submission to this court in other maritime cases. That, therefore, a full copy of the proceedings of the Industrial Accident Commission herein is not necessary to determination of the case. The following is therefore respectfully submitted as the return of said Commission to the Writ of Review issued herein.

I. Industrial Accident Commission admits that the Petition for Writ of Review correctly states the facts.

II. Amplifying the statement of facts contained in the Petition [fol. 17] for Writ of Review, this respondent attaches as exhibits to this return the following documents: (1) Copy of the stipulations and list of issues entered into by the parties at the first hearing before respondent Commission in this matter, held February 2, 1923, as Exhibit "A"; (2) Findings and Award of respondent Commission, as Exhibit "B"; (3) A stipulation between counsel, as Exhibit "C."

III. Answering paragraph 6 of the Petition for Writ of Review, respondent denies that in entering its findings and award in the proceeding here under review, it acted without and in excess of its powers; denies that the findings of fact did not support the award; denies that the order and award are unreasonable.

IV. Answering paragraph 7 of the Petition for Writ of Review, this respondent denies that the amendments to sections 24 and 256 of the United States Judicial Code, approved June 10, 1922, are unconstitutional.

V. This respondent avers that its findings and award made and entered in the proceeding here under review are just and lawful and were made with full jurisdiction over the parties, subject matter and cause of action for the following reason:

1. Petitioners are subject to the provisions of the California Workmen's Compensation Act with respect to the proceeding here under review in that they have voluntarily elected by the taking out of workmen's compensation insurance, in the manner prescribed by section 70 of the California Workmen's Compensation, Insurance and Safety Act of 1917, to have their liability to their injured employees and dependents of deceased employees determined by said [fol. 18] act in the place and stead of the law maritime.

2. The petitioner insurance company is the sole party in interest and is directly and primarily bound to the compensation claimants in the present case by its policy contract. Said petitioner insurance company is not itself engaged in a maritime occupation and is not entitled to defend this proceeding upon the ground of alleged conflict between the state law and the law maritime. Said petitioner insurance company is further estopped to repudiate its policy contract.

3. The application of the California Workmen's Compensation Act to the injury which forms the basis of the proceeding here under review is authorized by an act of Congress, approved June 10, 1922, amending sections 24 and 256 of the United States Judicial Code, to save to claimants, other than a master or member of the crew of a vessel, their rights and remedies under the Workmen's Compensation Act of any state.

4. The application of the California Workmen's Compensation, Insurance and Safety Act of 1917 to the injury which forms the basis of the proceeding here under review is authorized by an act of Congress, approved March 6, 1917, amending sections 24 and 256 of the Federal Judicial Code, to save to claimants their rights and remedies under the Workmen's Compensation Act of any state.

5. The application of the California Workmen's Compensation, Insurance and Safety Act of 1917 to the injury which forms the basis of the proceeding here under review is authorized by sections 24 and 256 of the United States Judicial Code and by the "saving

clause" contained therein, without regard to the acts of Congress of June 10, 1922 and October 6, 1917.

6. The application of the California Workmen's Compensation, Insurance and Safety Act of 1917 to the injury which forms the [fol. 19] basis of the proceeding here under review does not contravene the essential purposes and the characteristic harmony and uniformity of the general maritime law in its interstate and international aspects and the application of such said statute is not excluded by said general maritime law.

7. The employment and subject matter here under review are local in character and may, therefore, be governed by the local law instead of by the general law maritime under recent decisions of the United States Supreme Court.

Wherefore, respondent Industrial Accident Commission of the State of California prays that its findings and award in this proceeding be affirmed by this court.

W. H. Pillsbury, Counsel for respondent Industrial Accident Commission.

[fol. 20]

#### EXHIBIT A TO RETURN

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

Portion of the Transcript of Testimony, Including Stipulations and Issues, of Hearing Held Before the Industrial Accident Commission in San Francisco, California, on February 2, 1923

It is hereby Stipulated:

(1) That Eugene Hayes, hereinafter termed the employee, was, on the 5th day of September, 1922, at San Francisco, California, in the employment of defendant, James Rolph Company, hereinafter termed the employer.

(2) That at the said time the General Accident and Life Insurance Company, was the insurance carrier for the defendant employer and is liable for any compensation herein awarded.

(3) That the application was filed within the time prescribed by law.

(4) That on the said September 5, 1922, the deceased employee was standing near the hold (number 2) of ship West Islip, that he lost his balance, falling into said hold, and sustaining thereby a fracture of the skull and internal injuries, proximately causing his death the same day.

[fol. 21] (5) That the said injury was not caused by wilful misconduct of the employee or employer nor was it intentionally self-inflicted.

(6) That all medical treatment furnished in the past has been furnished by the said employer.

(7) That notice of said injury was given the employer according to law.

(8) That at the time of death the decedent was a stevedore and was 45 years of age.

(9) That the funeral expenses, necessary for the burial of deceased, in the sum of \$110, have been paid by Comisky and Connolly; if an award is made these expenses can be made payable direct to Comisky and Connolly, to the amount of one hundred dollars.

The issues are:

- (1) Jurisdiction of Commission.
- (2) Average earnings of deceased.
- (3) Dependency.
- (4) Liability for burial expense.

[fol. 22]

# EXHIBIT "B" TO RETURN

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

No. 12688

JOSEPH HAYES, THOMAS HAYES, HELEN HAYES and MARY HAYES,  
Minors, by Mary Lordan, Guardian of Their Persons and Estates,  
Applicants,

vs.

JAMES ROLPH COMPANY and GENERAL ACCIDENT, FIRE & LIFE  
ASSURANCE CORPORATION, LTD., Defendants

Applicants' attorney: J. J. O'Toole.

Defendants' attorney: W. F. Murray.

## Findings and Award

An application for adjustment of claim for compensation having been filed herein, and all parties having appeared and the matter having been regularly heard before James Sykes, Referee, and sub-

mitted for decision, this Commission makes its findings and award as follows:

### Findings of Fact

1. Eugene Hayes, while employed as a stevedore on September 5, 1922, at San Francisco, California, by defendant James Rolph Company, sustained injury occurring in the course of and arising out of his employment, as follows: Fell into hold Number Two of the Steamship "West Islip," thereby fracturing his skull, said injury proximately causing his death the same day. At said time said defendant's insurance carrier was General Accident, Fire & Life Assurance Corporation, Ltd., and the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917.

2. At said time the "West Islip" was discharging a cargo of coal which it had carried from Newcastle, New South Wales, to Pier 15, [fol. 23] one of the piers in the navigable waters of San Francisco Bay, which said cargo had been consigned to defendant James Rolph Company.

3. At said time said Eugene Hayes was not a member of the crew of said steamship "West Islip," nor was he under the direction and control of its officers.

4. Employee left surviving him, wholly dependent, Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes, his minor children, who are entitled to a death benefit of \$3,800.00, payable at the rate of \$16.25 a week, together with an award for \$100.00 burial expense payable direct to Comiskey & Connolly. Said payments are based upon average weekly earnings of \$25.00. Payments accrued to and including May 22, 1923, are \$601.25; payments made are none; balance due as of said date \$601.25.

5. It is the judgment of this Commission that the whole amount of said death benefit should be paid directly to Mary Lordan, as guardian of the persons and estates of the applicants for the support of said minor children during their minority, to be received by her in her own right and disbursed in her discretion for such purpose.

6. The claimants' attorney is entitled to a lien against unpaid compensation for the reasonable value of his services in the sum of \$75.00.

### Award

Award is therefore made in favor of Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes, applicants, against General Accident, Fire & Life Assurance Corporation, Ltd., defendant, of a death benefit and burial expense in the total sum of \$3,900.00 payable:

1. To Comiskey & Connolly the sum of \$100.00 for the burial expense.

[fol. 24] 2. To Mary Lordan, as guardian of the persons and estates of Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes, forthwith \$601.25, less an attorney's fee of \$75.00, payable to John J. O'Toole; and the further sum of \$16.25 to said applicant weekly for approximately 196.84 weeks and until the whole of this award shall have been paid; and

It is further ordered that the employer herein be dismissed from this proceeding and discharged from liability herein.

Dated at San Francisco, California, this 31st day of May, 1923.

Industrial Accident Commission of the State of California.

Will J. French, A. J. Pillsbury, Commissioners. Attest:  
H. L. White, Secretary. (Seal.) JS.:AM.

[fol. 25] EXHIBIT "C" TO RETURN

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

### Stipulation

It is hereby stipulated by and between the parties to the above entitled proceeding as follows:

1. That Eugene Hayes, the deceased employee in this proceeding, was not at the time of his fatal injury and death, the master or a member of the crew of the S. S. "West Islip," upon which he was injured.

2. That the objection to the jurisdiction of the Industrial Accident Commission over the claim for death benefit was raised by petitioners at the first opportunity in the proceedings, to-wit: in their answer to the application for adjustment of claim, and has not been abandoned by petitioners, but has been raised at all steps in said proceedings; that attached hereto are copies of the answer to the application (Exhibit "X") and petition for rehearing (Exhibit "Y") after findings and award by the Industrial Accident Commission.

3. That attached hereto (Exhibit "Z") is a copy of the policy of insurance issued by petitioner, General Accident Fire & Life Assurance Corporation, Limited, to petitioner, James Rolph & Company, referred to in Paragraph V of the return of respondent, Industrial Accident Commission.

Redman & Alexander, Counsel for Petitioners. Warren H. Pillsbury, Counsel for Respondent, Industrial Accident Commission.

[fol. 28] [File endorsement omitted.]

[fol. 29] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.  
IN BANK

[Title omitted]

SUBMISSION OF CAUSE—Filed Nov. 5, 1923

By the COURT:

All of the briefs having been filed pursuant to an order entered herein September 4, 1923, matter (review) submitted as of this date.  
Dated: November 5, 1923.

Wilbur, C. J.

[fol. 30] SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

OPINION—Filed Nov. 14, 1923

This is a proceeding in review to test the validity of an award made by the respondent Industrial Accident Commission to the dependents of Eugene Hayes, who died as the result of injuries sustained while working as a stevedore upon a vessel afloat on the navigable waters of the Bay of San Francisco. His employer at the time, petitioner James Rolph Company, carried workmen's compensation insurance with General Accident, Fire and Life Assurance Corporation, Ltd., who is the other petitioner. This policy is a combined employers' [fol. 31] liability and workmen's compensation policy, which obligates the insurance carrier to pay the award made by the respondent Commission in this case, if the validity of such award shall be sustained.

Eugene Hayes, the deceased employee, at the time of his death was in the temporary employ of the James Rolph Company, which corporation was, among other things, an importer of coal. On September 5, 1922, Hayes was employed and was engaged in his capacity as stevedore upon a vessel, the "West Islip", which was discharging a cargo of coal brought from Newcastle to San Francisco consigned to the James Rolph Company. The vessel was moored to Pier 15, one of the piers in the navigable waters of the Bay of San Francisco. The cargo of coal was being unloaded from the hold of the vessel by stevedores, of whom Hayes was one. On the morning of the accident, Hayes had gone upon the vessel, but, before going below to the hold where he was required to work, he secured an iron plate used in the unloading process, and in attempting to throw the plate below, overbalanced and fell into the hold of the vessel, sustaining injuries from which he died. The Industrial Accident Commission found that Hayes while employed as a stevedore sustained injuries occurring in the course of and arising out of his employment. Over the objection of the petitioners that the Commission had no jurisdic-

tion over the claim for death benefits, the Commission made an award in favor of the applicants below for a death benefit amounting to the sum of thirty-nine hundred dollars. Within due time thereafter, the defendants filed an application for a rehearing, alleging that the Commission in making the award acted without and in excess of its jurisdiction. A rehearing being denied, petitioners have brought this proceeding.

It is the contention of the petitioners that at the time of the accident and injury to Eugene Hayes, he was engaged in the performance of a maritime contract, and in the actual performance of work of a maritime nature, thus divesting the respondent Industrial Accident Compensation of jurisdiction in the premises. In response, and in opposition, to this contention that the Commission was without jurisdiction to make an award in this case under the State Workmen's Compensation Act, by reason of a conflict of the provisions of such act with the federal law maritime, respondent advances five points. Briefly stated, the first four are: (1) That the Commission has jurisdiction in the premises in that the employer voluntarily elected, in the manner prescribed by section 70 of the California Workmen's Compensation Act, to bring its employees under said act; (2) that the petitioning insurance carrier is the sole party in interest, and is directly and primarily bound by its policy contract, and is estopped to repudiate an obligation voluntarily assumed for a valuable consideration; (3) that the Industrial Accident Commission has jurisdiction by virtue of sections 24 and 256 of the Federal Judicial Code as originally enacted, October 6, 1917; (Chap. 97, 40 U. S. Stats. 395.) (4) that the Commission has jurisdiction in that the application of the California Workmen's Compensation Act does not contravene the essential purpose and the characteristic harmony and uniformity of the general maritime law in its interstate and international aspects.

At the time this petition was filed, there was pending in this court two proceedings in certiorari which have since been decided, and which dispose of the issues raised by this petition and the four answering contentions of the respondent just stated. (*Alaska Packers Association v. I. A. C. and J. Hansen*, 66 Cal. Dec. 273, and *Zurich General Accident, etc. Co. v. I. A. C. and Jennie A. Denny*, 66 Cal. Dec 277.) Because time for a rehearing had not elapsed when the [fol. 33] respondent Commission filed its answer in this matter, it reasserted its contentions one and two referred to. Points three and four have been reasserted by the Commission to save them for the record in the case if the present proceeding should later be carried to the Supreme Court of the United States, its declared intention in that regard being to secure a reversal, if possible, of the rule laid down in *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. We are satisfied with the conclusions reached and announced in the *Alaska Packers* case and in the *Zurich* case, *supra*. They satisfactorily dispose of the contentions thus far noted in this proceeding.

The fifth and last contention of the respondent, while adverted to in the *Alaska Packers* case, *supra*, was not directly decided. It is



that the Act of Congress approved June 10, 1922, amending sections 24 and 256 of the Judicial Code as enacted in 1917, confers jurisdiction upon the Industrial Accident Commission in cases like that involved in this proceeding. The Judicial Code, as it stood prior to October 6, 1917 (sec. 24 and 256), vested the United States District Court with original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it", and provided that the jurisdiction thus vested in the courts of the United States in such cases and proceedings "shall be exclusive of the courts of the several states". In a proceeding involving an attempt of the Workmen's Compensation Commission of New York to assume jurisdiction in the case of a stevedore receiving injuries which resulted in his death, while unloading a ship lying in navigable waters, the Supreme Court of the United States held that the work of a stevedore, in which work the decedent Jensen was engaged, was [fol. 34] maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. (*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, citing *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59-60.) Jurisdiction was therefore denied to the Workmen's Compensation Commission.

Following the Jensen case, Congress, on October 6, 1917, amended the Judicial Code, sections 24 and 256, by the insertion in each section of a clause purporting to save "to claimants the rights and remedies under the workmen's compensation law of any state." (Chap. 97, 40 U. S. Stats. 395.) This amendment to the Judicial Code was held by this court to be unconstitutional in that it violated article III, section 2, of the Federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. (*Sudden & Christenson v. I. A. C.*, 182 Cal. 437.) In a case involving the same question, the United States Supreme Court also held the amendment unconstitutional declaring it beyond the power of Congress to authorize and sanction action by the states in prescribing and enforcing rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.)

Following these decisions, the Judicial Code was again amended. On June 10, 1922, Congress once more attempted by reenactment of sections 24 and 256 of the Code to save to claimants for compensation for injuries to, or death of, persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation laws of the various states. The act provided that such rights and remedies when conferred by work- [fol. 35] men's compensation laws should be exclusive, and "that the jurisdiction of the District Courts shall not extend to cases arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any state, district, territory or pos-

session of the United States." (42 U. S. Stats. 634.) In our opinion, the Judicial Code as last amended is still subject to the objections pointed out by this court in *Sudden & Christenson v. I. A. C.*, supra, and by the Federal Supreme Court in *Knickerbocker Ice Co. v. Stewart*, supra. In effect, the last amendments do not differ from the earlier enactments, except that the master and members of crews are excluded from their operation, and the state compensation laws are made the exclusive remedies. Because of these exceptions, the statute is now more repugnant than it was before the last amendments, for the reason that it is discriminatory, and attempts to deprive the federal courts of jurisdiction over certain admiralty and maritime cases while vesting them with jurisdiction in others. As was pointed out in *Sudden & Christenson v. I. A. C.*, supra, the Federal Constitution provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. It has been many times held that the work of a stevedore is maritime in its nature, and the rights and liabilities of the parties connected therewith are matters which are within the admiralty jurisdiction of the United States. (*Southern Pacific Co. v. Jensen*, supra; *Atlantic Transport Co. v. Imbrovek*, supra.)

Respondent admits that by this amendment "Congress retracts the scope of the law maritime and the jurisdiction of the United States courts in admiralty so that there is no longer either a substantive maritime law or an admiralty jurisdiction in the federal courts which shall conflict with the application of state workmen's compensation acts to longshoremen." In addition to what we have already said, an answer to this proposition is to be found in a decision of the Supreme Court of the State of Washington, which was recently called upon to consider the exact question. "By this amendment," say the Washington court, "Congress attempted to take from the District Courts jurisdiction where the workmen's compensation law of any state, district, or territory had given a remedy. It was an attempt, in effect, to bring within the workmen's compensation law of any state or territory a branch or a part of the admiralty jurisdiction of the United States. \* \* \* but Congress has not exclusive right in determining where matters which are within the admiralty jurisdiction of the United States shall be adjudicated. Article III, section 2, of the federal Constitution provides in part as follows: 'The judicial power shall extend to \* \* \* all cases of admiralty and maritime jurisdiction.'" The court then goes on to review a number of leading cases decided by the Supreme Court of the United States relating to the subject, and says: "In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, the 1917 amendment, as above stated, was held to be unconstitutional. The same reasons which defeated the constitutionality of that act would apply here to the effect that the state law cannot encroach upon the admiralty matters, where to do so would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations. This court is not holding the 1922 amend-

ment, wherein it attempts to divest the district court of jurisdiction, of no effect. The more precise question is whether the state has a right to encroach upon the general maritime law in a way that would affect its harmony and uniformity in its interstate relations. [fol. 37] \* \* \* The bringing of an employer engaged in the stevedore business within the provisions of the Industrial Insurance Act would take from the admiralty jurisdiction conferred by the federal Constitution upon the United States and vest it in the state. As we read the decisions of the Federal Supreme Court, this may not be done, because to do so, as pointed out in *Southern Pacific Co. v. Jensen*, supra, and *Knickerbocker Ice Co. v. Stewart*, supra, would work material prejudice to the characteristic features of the general maritime law, and interfere with the proper harmony and uniformity of that law in its international and interstate relations." (*State v. W. C. Dawson & Co.*, 211 Pac. 724.) The opinion of the Washington court, above quoted, was first rendered in department. On rehearing, the holding in the department opinion was adhered to. (*State v. W. C. Dawson & Co.*, 212 Pac. 1059.)

In this case, as in the Washington case, reliance has been placed upon a line of decisions which hold that where a stevedore is working on the dock, which is but an extension of the land, and there receives his injury, he has a common law right of action which may, under certain circumstances, be withdrawn and he be permitted or required to take under a workmen's compensation act. (*State Ind. Comm. of N. Y. v. Nordenholt Corp.*, et al., 259 U. S. 263, 42 Supt. Ct. 473.) That case clearly differentiates the contention made by respondent, and points out the line of demarcation between those cases which fall strictly within the maritime jurisdiction and those which, because of their nature, are cognizable under state statutes. A stevedore who works upon a boat or upon navigable waters does not have a common law right of action which may be withdrawn and he be permitted or required to take under a compensation act. In the Nordenholt case, the distinction was pointed out, and the court said: "When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

It follows therefore that the respondent Industrial Accident Commission acted without and in excess of its jurisdiction in this matter.

The award is annulled.

Waste, J. We concur: Lennon, J., Kerrigan, J., Myers, J., Seawell, J., Lawlor, J., Wilbur, C. J.

[fol. 41] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

### JUDGMENT

It follows therefore that the respondent Industrial Accident Commission acted without and in excess of its jurisdiction in this matter. The award is annulled.

Waste, J. We concur: Lennon, J., Kerrigan, J., Myers, J., Seawell, J., Lawlor, J., Wilbur, C. J.

[fol. 42] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

### STIPULATION FOR RECORD AND PARTIAL AGREED STATEMENT OF FACTS FOR DIMINUTION OF RECORD

Stipulated by and between counsel for plaintiffs in error and counsel for defendants in error that the clerk of the Supreme Court of California may return the following mentioned documents and none other as the record in the above-entitled proceeding upon writ of error.

1. Petition for writ of review in the Supreme Court of California.
2. Order granting writ of review.
3. Writ of review.
4. Return of Industrial Accident Commission with exhibits "A" and "B" and stipulation of counsel incorporated therein. It is understood that the partial agreed statements of fact appearing below in this stipulation shall take the place of exhibits "X" and "Y" and the insurance policy attached to said return, and that said exhibits [fol. 43] and policy shall be omitted from the record on error.
5. Order of submission.
6. Opinion and judgment of Supreme Court of California.
7. Copy of docket entries in office of clerk of Supreme Court of California.
8. Certificate of clerk of Supreme Court of California.
9. This stipulation.
10. Proceedings upon application for writ of error.

Further stipulated that defendants in error raised before the Industrial Accident Commission of California, in their answer filed

to the application for adjustment of claim in the proceeding before said Commission in this matter, the claim and defense that the application of the Workmen's Compensation Act of California was precluded by the constitution and the law maritime of the United States, and further claimed that Industrial Accident Commission was without jurisdiction to try and determine said proceeding for said reason. That said defense was insisted upon throughout the entire course of said proceeding before Industrial Accident Commission and was again raised and presented in the petition for rehearing filed by defendants in error with Industrial Accident Commission on June 8, 1923.

Further stipulated that the policy of insurance issued by General Accident, Fire and Life Assurance Corporation, Limited, to James Rolph Company, set out in full in the return of Industrial Accident Commission to the writ of review issued by the Supreme Court of California, contains, among other things, the following paragraphs defining the insurance coverage of said policy and the following paragraph setting forth the Declarations contained in said policy, and that said paragraphs appearing below are true and correct copies of the portions of said insurance policy indicated:

[fol. 44] "Universal Standard Workmen's Compensation Policy

General Accident, Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, United States Branch (Hereinafter Called the Corporation)

Does hereby agree with this Employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom as follows:

One (a). To pay promptly to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all instalments thereof as they become due,

(1) To such person because of the obligation for compensation for any such injury imposed upon or accepted by this Employer under such of certain statutes, as may be applicable thereto, cited and described in an endorsement attached to this Policy, each of which statutes is herein referred to as the Workmen's Compensation Law, and

(2) For the benefit of such person the proper cost of whatever medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral expenses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they

apply to compensation or other benefits for any personal injury or death covered by this Policy, while this Policy shall remain in force. Nothing herein contained shall operate to so extend this Policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached.

One (b). To indemnify this Employer against loss by reason of the liability imposed upon him by law for damages on account of injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada. In the event of the bankruptcy or insolvency of this Employer the Corporation shall not be relieved from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency, an execution against this Employer is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person claiming by, through or under the injured, against the Corporation under the terms of this Policy for the amount of the judgment in said action not exceeding the amount of this Policy."

[fol. 46]

No. 21

#### "Endorsement

Not valid unless countersigned by a duly authorized representative of the corporation.

July 1st, 1922.

California

The obligations of Paragraph One (a) of the Policy to which this endorsement is attached include such Workmen's Compensation Laws as are herein cited and described and none other.

Chapter 586, Laws of 1917, State of California, the authorized title of which is the "Workmen's Compensation Insurance and Safety Act of 1917," (except the increase in any award under the provisions of Section 6 (b) thereof, insurance of such increase being prohibited by Section 31 (b) thereof), all the foregoing, subject to such exception, is, for the purposes of this insurance, called the Workmen's Compensation Law.

and all laws amendatory thereof and supplementary thereto which may be or become effective while this Policy is in force.

This Employer, upon the acceptance of this Policy, agrees that the remuneration of all employees of any contracting employer, who undertakes for this Employer any part of the business operations covered by this Policy under the conditions set forth in Section 25 of such Workmen's Compensation Law, shall be included in the return of remuneration upon which premium is computed, and such remuneration, so reported, shall in all respects, be governed by the

same terms, conditions and requirements of the Policy as the remuneration of the direct employees of this Employer. The requirements of this paragraph shall not apply if this Employer is not liable under said section or is exempted from such liability through compliance with its terms.

If this Employer furnishes board or lodgings to any employee, the value thereof shall be included in the remuneration on which the premium is based at monthly rates not less than the following:

For Board only.....	\$24.00
For Lodging only.....	6.00
For both Board and Lodging.....	30.00

The Policy is so amended that if this Employer is a corporation, the remuneration of the President, any Vice President, Secretary or Treasurer shall be returned and made subject to the premium charge at its actual amount but not in excess of \$1,666.66 per annum, the foregoing being without regard to the nature of the duties of any such officer.

The Company agrees to allow any reduction in the policy rates which may be promulgated by the California Inspection Rating Bureau under the Industrial Compensation Rating Schedule and/or the California Experience Rating Plan as approved by the Insurance Commissioner of California; and this Employer agrees to accept any increase in the policy rates which may be promulgated by the California Inspection Rating Bureau under the Industrial Compensation Rating Schedule and/or the California Experience Rating Plan. The effective date of any such reduction or increase shall be the effective date thereof fixed by the California Inspection Rating Bureau.

Attached to and forming part of Policy No. U-63848, issued by the General Accident Fire and Life Assurance Corporation, Ltd., of Perth, Scotland, to James Rolph and Co.

Frederick Richardson, United States Manager. Form Comp-3450 3M 4-23. Sample Policy.

[fol. 47½]

#### Declarations

Item 1. Name of this Employer: James Rolph & Co. P. O. Address: 60 California St., San Francisco, Calif.

For the purpose of serving notice, as in the Policy provided, this Employer agrees that this address may be considered as both the residence and business address of this Employer or any representative upon whom notice may be served.

Individual, co-partnership, corporation or estate? Corporation.

Item 2. The period during which the Policy shall remain in force, unless canceled as in the Policy provided (herein called the Policy Period) shall be from July 1st, 1922, to July 1st, 1923, at twelve and one minute o'clock A. M., standard time, as to each of said dates at the place where any operation covered hereby is conducted, as re-



spects that operation, or at the place where any injury covered hereby is sustained, as respects that injury.

Item 3. Locations of all factories, shops, yards, buildings, premises or other workplaces of this Employer, by Town or City, with Street and Number Main St. bet. Harrison and Bryant, Bunkers Pier 15, Quint St. Yard, Alameda Estuary, 60 California St. & elsewhere in Calif.

All business operations, including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following Divisions as are undertaken by this Employer. (1) All industrial operations upon the premises. (2) All office forces. (3) Operations not on the premises.

Classification of operations : Note—If more than one classification indicate each other by (b), (c), (d), etc.	Estimated total annual remuneration	Rate per \$100 of remuneration		Estimated premium
1 (a). 8220. Coal Merchants receiving or shipping by water or by land and water, including stevedoring operations, if any.....	\$8,545	5.67		\$484.50
(x) President, any Vice-President, Secretary or Treasurer of corporate Employer who performs duties of Superintendent, Foreman or Workman. Not covered hereunder.				
2 (a) Clerical Office Employees.....	8,810 3.000	.05		1.50
(b) Draughtsman (engaged exclusively in the profession) office duties only .....	8,811	....		.....
3 (a) Erection, installation, repair or demonstration of Employer's product, as follows:				
(Manual Classification)				
(b) Outside Salesmen, collectors and messengers (wherever engaged) who do not deliver merchandise.....	8,742	....		.....
(c) Drivers and Drivers' Helpers (if not included in 1) wherever engaged.				
(d) Chauffeurs and Chauffeurs Helpers (if not included in 1) wherever engaged .....	7,380	....		.....

Minimum Premium for this Policy shall be \$65.00.  
Estimated Advance Premium \$486.00.

Item 4. The foregoing enumeration and description of employees includes all persons employed in the service of this Employer in connection with the business operations above described to whom re-[fol. 49] muneration of any nature in consideration of service is paid,



allowed or due together with an estimate for the Policy Period of all such remuneration. This enumeration and description with the estimated remuneration shall also include the President, any Vice-President, Secretary or Treasurer of this Employer if a corporation if actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman, but any such designated officer not so engaged shall not be included in such enumeration, description or estimated remuneration. The foregoing estimates of remuneration are offered for the purpose of computing the advance premium. The Corporation shall be permitted to examine the books of this Employer at any time during the Policy Period and any extension thereof and within one year after its final termination so far as they relate to the remuneration earned by any employee of this Employer while the Policy was in force.

Item 5. This Employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated: No Exceptions.

Item 6. No similar insurance has been canceled by any insurance carrier during the past year—except as herein stated: No Exceptions.

Item 7. The following signature is authorized and accepted by this Employer as his signature.

(Copy of Signature to Proposal.)

Item 8. There are no elevators at any of the premises above described under the Assured's control—except as herein stated: There are elevators.

[fols. 50 & 51] In witness whereof, the General Accident, Fire and Life Assurance Corporation, Ltd., by its United States Manager, has executed these presents, but this policy shall not be valid unless countersigned by an authorized representative of the Corporation.

Countersigned at San Francisco, Calif., this 10th day of June, 1923.

(Signed) Hind Co., Authorized Representative.

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(EXHIBIT "Z")

Form Comp. 3178.

This stipulation is entered into this 26 day of November, 1923.

Warren H. Pillsbury, Counsel for Plaintiffs in Error. Redman & Alexander, Counsel for Defendants in Error.

[File endorsement omitted.]

[fol. 53] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Nov. 22, 1923

To the Honorable Curtis D. Wilbur, Chief Justice of the Supreme Court of the State of California:

The petition of Industrial Accident Commission of the State of California and Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes, minors, by Mary Lordan, Guardian of their persons and estates, respectfully shows:

That in the records, proceeding and decision in the Supreme Court of the State of California, the same being the highest court of this state in which a decision could be had, manifest error has occurred in this proceeding, greatly to the damage of plaintiffs in error above named.

That, as appears in the record and proceeding, there was drawn in question by defendants in error herein the validity of an Act of the Congress of the United States approved June 10, 1922, 42 Stat. 634-5, Chap. 216, upon the ground that said Act of Congress was repugnant [fol. 54] to the Constitution of the United States, and the decision of this court was against the validity of said Act of Congress; and wherein there was drawn in question by defendants in error herein the validity of an authority exercised by plaintiffs in error herein under the Workmen's Compensation, Insurance & Safety Act of 1917 of the State of California and said Act of Congress of June, 10, 1922, upon the ground of its being repugnant to the Constitution and laws of the United States, and the decision of this court was against the validity of said authority, all of which fully appears in the record and proceeding of the case and is specifically set forth in the assignment of errors filed herewith.

A brief statement of the facts and of the proceedings had in this matter is as follows: Eugene Hayes, father of Joseph, Thomas, Helen and Mary Hayes, plaintiffs in error herein, was killed on September 5, 1922, at San Francisco, California, while working as a stevedore on the steamship West Islip, at said time afloat upon navigable waters of San Francisco Bay, by a fall into the hold of said vessel. Said Eugene Hayes was not a master or a member of the crew of said vessel. James Rolph Company, defendant in error, was the employer of Hayes at the time of his injury, and General Accident, Fire and Life Assurance Corporation, Ltd., was the insurer of said employer at said time under a policy of workmen's compensation insurance.

The Statutes of the State of California, hereinafter termed the "Workmen's Compensation Act," (Chapter 176, California Laws 1913; Chapter 586, California Laws 1917) provide a system of limited benefits or indemnity to disabled employees or dependents of deceased employees, injured in the course of and arising out of their employment without regard to fault, including maritime work-

[fol. 55] ers as far as they may constitutionally be included, and also provide for determination of any and all disputes arising under said Workmen's Compensation Act by the Industrial Accident Commission of the State of California, created therein. Claim was filed before said Industrial Accident Commission on January 2, 1923, by Mary Lordan, as guardian of the persons and estates of said Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes, minors, plaintiffs in error herein, against James Rolph Company and General Accident, Fire and Life Assurance Corporation, Ltd., for a death benefit under said Workmen's Compensation Act. Said defendants duly appeared and defended in said proceeding upon the grounds that the Workmen's Compensation Act of California could not be applied to the injury on account of its maritime character and the maritime character of the service rendered by the deceased and further that the Act of Congress of June 10, 1922, hereinbefore referred to, purporting to extend the application of said state workmen's compensation act to such maritime injuries, violated the Constitution of the United States. Said proceeding was regularly heard and determined by Industrial Accident Commission of California, which as its decision overruled said defenses and applied the Workmen's Compensation Act, awarding a death benefit to the minor children of deceased.

Decisions of the Industrial Accident Commission of California are reviewable by the Supreme Court of California by a writ of certiorari, denominated in the California statutes a writ of review. Such writ of review was regularly sued out by said defendants before said Commission from said Supreme Court of California, being issued August 21, 1923. This proceeding in review was regularly heard before said court which as its decision in the matter, entered on November 14, 1923, annulled the award of Industrial Accident [fols. 56 & 57] Commission upon the ground that said Act of Congress of June 10, 1922, was in violation of the Constitution of the United States and that the California Workmen's Compensation Act was precluded by the Constitution of the United States and law maritime from applying to the death of Eugene Hayes.

Industrial Accident Commission of the State of California is authorized by the Statutes of California to appear by its own counsel in any proceeding in review of its decisions, and to intervene, if possible, in any action or proceeding in which any question arising under or affecting its jurisdiction of the application of the California Workmen's Compensation Act may be presented.

Wherefore, petitioners pray that a writ of error returnable to the Supreme Court of the United States be allowed for the correction of the errors so complained of; that a citation be granted and signed; that the amount of the bond for costs required from plaintiffs in error be fixed; and that a transcript of record, proceedings and papers upon which said judgment was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said court in such cases made and provided.

Warren H. Pillsbury, Attorney for Plaintiffs in Error.

Presented to and received by me this 21 day of November, 1923.  
Curtis D. Wilbur, Chief Justice of the Supreme Court of  
the State of California.

[fol. 58] [File endorsement omitted.]

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[fols. 59 & 60] IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR AND FIXING COST BOND—Filed  
Nov. 22, 1923

Upon filing of a petition for writ of error with accompanying assignment of errors,

It is ordered that a writ of error be, and it is hereby allowed, to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein,

It is further ordered that the amount of the bond for costs to be furnished by plaintiffs in error to be fixed at 500.00 dollars.

Dated this 21 day of Nov., 1923.

Curtis D. Wilbur, Chief Justice of the Supreme Court of the  
State of California.

[fol. 61] [File endorsement omitted.]

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[fol. 62] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Nov. 22,  
1923

Now come Plaintiffs in Error above named, and in connection with their Petition for Writ of Error herein, make and file the following assignment of errors upon which they will rely for reversal of the Order and Judgment of this Honorable Court made on the 14th day of November, 1923, as follows, to-wit:

I. The Supreme Court of California erred in determining and deciding that the Act of Congress of June 10, 1922, 42 Stats. 634-5, Chap. 216, amending sections 24 and 256 of the United States Judicial Code to extend the protection of state workmen's compensation acts to maritime workers other than masters and members of the crews of vessels, is unconstitutional.

II. Said court erred in holding and determining that the Workmen's Compensation, Insurance and Safety Act of 1917 of the State [fol. 63] of California, Chapter 586, California Stats., 1917, is precluded from application in the above entitled proceeding under the authorization of said Act of Congress, or otherwise, by asserted conflict with the constitution and the general law maritime of the United States.

III. Said court erred in holding and determining that the general maritime law and the constitution of the United States precluded the application to the present cause of said state workmen's compensation act, viewed as an elective statute adopted by the voluntary act of the parties by the method of election prescribed in said statute.

IV. Said court erred in holding and determining that the general maritime law and the constitution of the United States precluded jurisdiction being conferred upon the Industrial Accident Commission of the State of California to enforce the provisions of a policy of workmen's compensation insurance issued by defendant in error General Accident, Fire and Life Assurance Corporation, Ltd., to defendant in error James Rolph Company, agreeing to pay to injured employees of said assured or dependents of deceased employees, the benefits specified by the aforesaid state workmen's compensation act, conditionally upon execution by such employees or their dependents of release of rights under the law maritime.

Wherefore plaintiffs in error pray that the Supreme Court of the United States will reverse said final order and judgment of the Supreme Court of California, and remand this proceeding to said Supreme Court of California with instruction to hold said Act of Congress of June 10, 1922, to be constitutional and valid and to hold the Workmen's Compensation, Insurance and Safety Act of 1917 of [fols. 64 & 65] the State of California to be applicable to said injury sustained by Eugene Hayes, notwithstanding the claim of conflict between said Act and the Constitution and Law Maritime of the United States, and to take such further action herein as may be proper in conformity with the opinion of the Supreme Court of the United States, and that plaintiffs in error be allowed their costs herein and such other or further order or relief as may be deemed proper and just.

Dated this 21st day of November, 1923.

Warren H. Pillsbury, Attorney for Plaintiffs in Error.

Presented to and received by me this 21 day of Nov., 1923.

Curtis D. Wilbur, Chief Justice of the Supreme Court of the State of California.

[fol. 66] [File endorsement omitted.]

[fols. 67-70] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 10814

[Title omitted]

BOND ON WRIT OF ERROR FOR \$500.00—Approved and filed Nov. 22,  
1923

[fol. 71] [File endorsement omitted.]

[fol. 72] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

WRIT OF ERROR—Filed Nov. 22, 1923

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Chief Justice and the Justices of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California before you, or some of you, being the highest court of law or equity in the said state in which a decision could be had in the said suit between James Rolph Company and General Accident, Fire and Life Assurance Corporation, Limited, a corporation, petitioners vs. Industrial Accident Commission of the State of California and Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes, by Mary Lordan guardian of their persons and estates, respondents, S. F. No. 10814, wherein was drawn in question the validity of a statute of the United States and the decision was against its validity, and wherein was drawn in question an authority [fols. 73 & 74] exercised under said statute and under the statutes of the State of California, and the decision was against its validity, a manifest error hath happened to the great damage of the said Joseph Hayes, Thomas Hayes, Helen Hayes and Mary Hayes and of the Industrial Accident Commission of the State of California, as by their complaint appears. We be- willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington within sixty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court

may cause further to be done therein to correct that error, what of right, and according to the laws and statutes of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 21 day of November, 1923.

Walter B. Maling, Clerk of the United States District Court for the Northern District of California. [Seal of the U. S. District Court, Northern Dist. of California.]

Allowed by Curtis D. Wilbur, Chief Justice of the Supreme Court of the State of California.

[fol. 75] [File endorsement omitted.]

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[fols. 76 & 77] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 10814

CITATION ON ERROR—Filed Nov. 22, 1923; omitted in printing

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[fols. 78 & 79] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM 1923

No. —

[Title omitted]

#### ADMISSION OF SERVICE

Due service of the accompanying citation issued in the above entitled proceeding and the writ of error upon which the same was issued, with receipt of a copy of each, is hereby admitted this 22 day of November, 1923.

Receipt is further acknowledged of a copy of each of the following papers:

1. Petition for Writ of Error.
2. Assignment of Error.
3. Order Allowing Writ of Error and Fixing Amount of Cost Bond.

Redman & Alexander, W. C. Bacon, Attorney- for Defendants in Error.

[fol. 80] [File endorsement omitted.]

[fol. 81] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

DOCKET ENTRIES

Clerk Supreme Court of the State of California

1923.  
 Aug. 16. Filed Petition for writ of review and Points and Authorities.  
 20. Writ ordered to issue, returnable Sept. 4, 1923.  
 21. Writ issued.  
 22. Writ returned with service.  
 Sept. 4. Filed return of respondent Industrial Acc. Commission.  
 4. Matter called, respondent 30 days; petitioner 30 days for briefs then to be submitted or placed on calendar as ordered.  
 Oct. 5. Filed brief of respondent Ind. Acc. Comm.  
 Nov. 2. Filed petitioner's reply brief.  
 5. Matter review submitted as of this date.  
 14. Award is annulled. Waste, J. We concur: Lennon, J., Kerrigan, J., Meyers, J., Seawell, J., Lawlor, J., Wilbur, C. J.

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[fol. 82] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. —

[Title omitted]

CERTIFICATE OF CLERK OF SUPREME COURT OF CALIFORNIA

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing and annexed are true and correct copies of petition for writ of review; order granting writ of review; writ of review; portions of return of Industrial Accident Commission to writ of review specified in stipulation attached hereto; order of submission; opinion of Supreme Court of California; judgment of Supreme Court of California; copy of docket entries in Clerk's office.

Stipulation for record from Supreme Court of California and partial agreed statement of facts. Petition for writ of error; original assignment of errors, order allowing writ of error and fixing cost bond, bond on writ of error. Original writ of error, original citation and admission of service of defendant in error of foregoing papers on proceeding in error.



Witness my hand and the seal of Supreme Court of California this 27th day of November, A. D., 1923.

B. Grant Taylor, Clerk of the Supreme Court of California,  
By I. Erb, Deputy. [Seal of the Supreme Court of California.]

Endorsed on cover: File No. 29,994. California Supreme Court. Term No. 684. Industrial Accident Commission of the State of California and Joseph Hayes, Thomas Hayes, et al., etc., plaintiffs in error, vs. James Rolph Company and General Accident, Fire and Life Assurance Corporation, Limited. Filed December 6th, 1923. File No. 29,994.

(1372)

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WM. R. STANSBURY  
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 684

INDUSTRIAL ACCIDENT COMMISSION  
OF THE STATE OF CALIFORNIA, and  
JOSEPH HAYES, THOMAS HAYES,  
HELEN HAYES and MARY HAYES, by  
MARY LORDAN, guardian and trustee of  
their estate,

*Plaintiffs in Error,*

vs.

JAMES ROLPH COMPANY and GEN-  
ERAL ACCIDENT, FIRE AND LIFE  
INSURANCE COMPANY,

*Defendants in Error.*

MOTION FOR ADVANCEMENT

WARREN H. PILLSBURY,  
*Counsel for Plaintiffs in Error.*



IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1923.

INDUSTRIAL ACCIDENT COMMISSION  
OF THE STATE OF CALIFORNIA, and  
JOSEPH HAYES, THOMAS HAYES,  
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*Plaintiffs in Error,*

vs.

JAMES ROLPH COMPANY and GEN-  
ERAL ACCIDENT, FIRE AND LIFE  
INSURANCE COMPANY,

*Defendants in Error.*

**MOTION FOR ADVANCEMENT.**

Now come plaintiffs in error and respectfully move this honorable court for the advancement of this cause for early presentation and decision. This motion is made for the reason that this cause involves the identical question now before this court in the case of *State of Washington vs. Dawson*, No. 366, recently advanced by this court for hearing on January 7, 1924. Both cases involve the con-

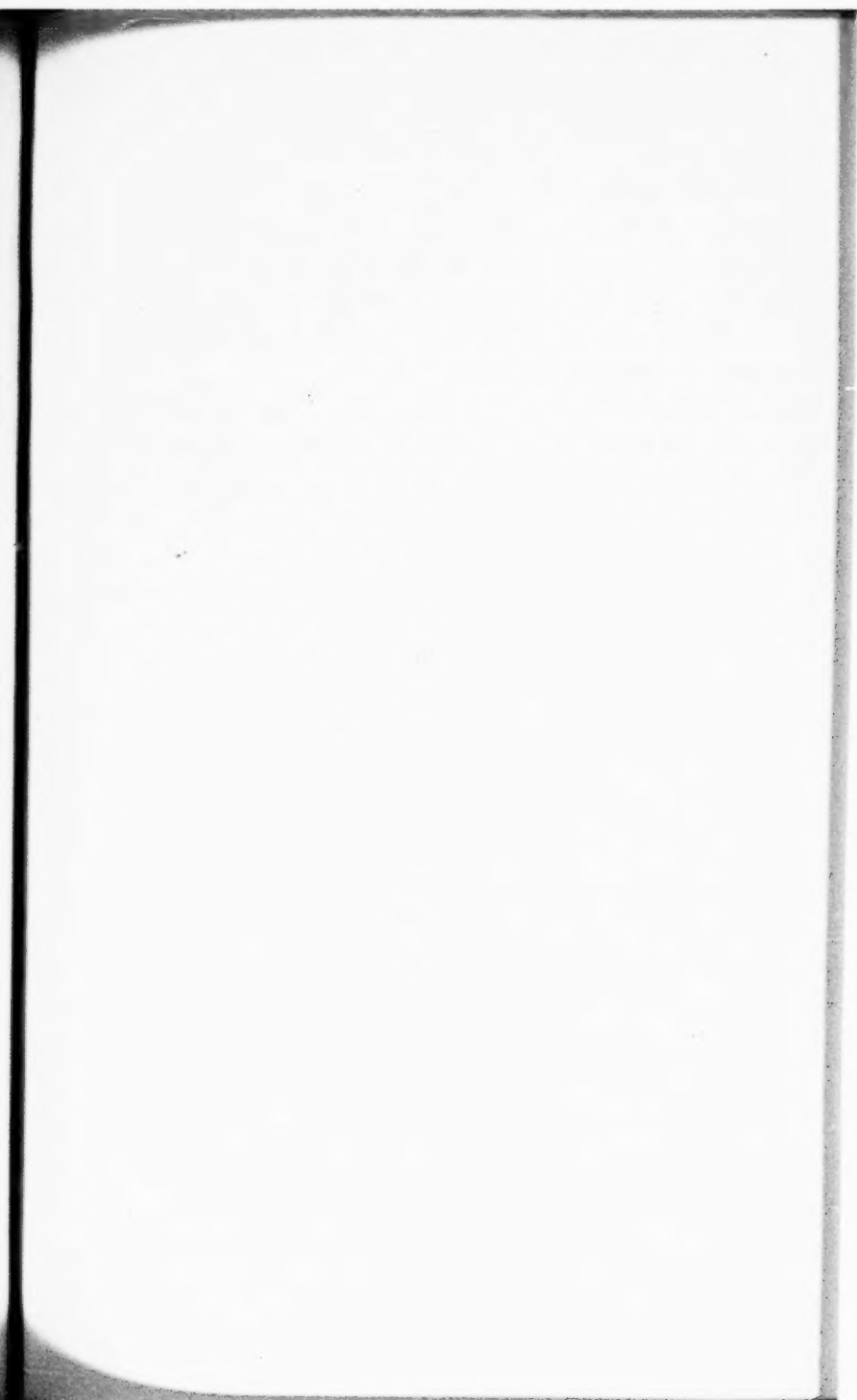
stitutionality of the act of congress of June 10, 1922, 42 Stat. 634, Chap. 216, amending sections 24 and 256 of the United States Judicial Code to extend to maritime workers other than masters and members of the crews of vessels, the protection of state workmen's compensation acts. In both the statute was held unconstitutional by the lower court.

The present case differs on its face from *State of Washington vs. Dawson*, in that in the present case claim is made by the minor children of a stevedore killed in the course of his employment upon a vessel, for a death benefit under the provisions of the Workmen's Compensation Act of California. In *State of Washington vs. Dawson*, the claim was one brought by the State of Washington to collect insurance premiums claimed to be due from stevedoring concerns engaged in longshore work and the loading and unloading of vessels.

This variance in the phase of the question presented involves some difference in arguments to be made upon the constitutionality of the statute and makes advisable consideration of both cases at the same time.

Respectfully submitted.

WARREN H. PILLSBURY,  
*Counsel for Plaintiff in Error.*



**FILE COPY**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

Office Supreme Court, U. S.

**FILED**

**JAN 5 1924**

**WM. B. STANSBURY**  
CLERK

**OCTOBER TERM, 1923.**

**No. 684.**

**INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and JOSEPH HAYES, THOMAS HAYES, HELEN HAYES and MARY HAYES, minors, by MARY LORDAN, guardian of their persons and estates,**

*Plaintiffs in Error,*

**vs.**

**JAMES ROLPH COMPANY and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a corporation,**

*Defendants in Error.*

**BRIEF FOR PLAINTIFFS IN ERROR**

✓ **WARREN H. PILLSBURY,**  
129 State Building, Civic Center,  
San Francisco, California,  
*Counsel for Plaintiffs in Error.*

CALIFORNIA STATE PRINTING OFFICE  
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IN THE  
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OCTOBER TERM, 1923.

No. 684.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and JOSEPH HAYES, THOMAS HAYES, HELEN HAYES and MARY HAYES, minors, by MARY LORDAN, guardian of their persons and estates,

*Plaintiffs in Error,*

vs.

JAMES ROLPH COMPANY and GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a corporation,

*Defendants in Error.*

**BRIEF FOR PLAINTIFFS IN ERROR.**

The first question presented to this court is whether the act of congress of June 10, 1922, 42 Stat. 634, Chap. 216, amending sections 24 and 256 of the Judicial Code to permit state workmen's compensation acts to apply to injuries sustained by persons in maritime service, other than masters and members of the crew of vessels, is constitutional.

The issue is whether congress may, during its pleasure, retract the federal jurisdiction in maritime matters involving injuries to local port workers, such as employees of stevedoring companies, of material men, supply men and ship repair yards, etc., permanent residents of the states in which they reside and earn their living, and thereby permit the states to make applicable to such workers under their police power the compensation laws they have enacted to protect their other citizens and workers generally. The power asserted, in brief, is to repeal portions of the federal substantive maritime law, in order to remove interference with protection by the states of their own local workers under their police power.

The second question tendered to this court is whether employers in local and harbor maritime work are prevented by the maritime law of the United States from voluntarily electing to bring themselves and their employees under state workmen's compensation acts, *i. e.*, from adopting by implied contract (in the manner provided in the elective provisions of such acts) the provisions of a state workmen's compensation act in the place of the rights and duties imposed by the law maritime. We understand the decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, to expressly permit such acceptance of state acts by election, but the Supreme Court of California has interpreted this decision otherwise. This question is also tendered to the court at this time in *Industrial*

*Accident Commission of the State of California and Mrs. Jenny A. Denny*, petitioners, vs. *Zurich General Accident and Liability Insurance Company, Limited*, respondents, No. 682, this term, in which petition for writ of *certiorari* has not yet been acted upon.

#### STATEMENT OF THE FACTS.

Eugene Hayes, a stevedore, was killed by a fall into an open hatchway on September 5, 1922, while working on the steamship *West Islip* at San Francisco in the unloading of a cargo of coal. The vessel was tied to her dock at the time and afloat upon navigable waters of San Francisco Bay. James Rolph Company, defendant in error, was Hayes' employer and was insured in defendant in error General Accident, Fire and Life Assurance Corporation under a policy of workmen's compensation insurance indemnifying it against loss under both the California Workmen's Compensation Act and the common law, including the maritime law. This policy was sufficiently broad to insure the employer under the compensation act if Hayes' injury be governed by it under any theory.

The California Workmen's Compensation Act, Chap. 586, Cal. Stat. 1917, is of compulsory obligation for most industries in the state and elective as to all others. Employers and employees of any class not within the compulsory provisions of the act may by their joint election bring themselves within it. By Sec. 70 of the act, such election may be made by the

employer taking out a policy of workmen's compensation insurance covering the employees in question. The California Supreme Court had held in *Zurich General Accident and Liability Insurance Co., vs. Industrial Accident Commission of California and Mrs. Jenny A. Denny*, 218 Pac. 563, being the case referred to above as now before this court upon petition for *certiorari*, that the procuring of such insurance would be sufficient to bind the employer except for the determination that any election to come under the State Compensation Act was prohibited by the maritime law. The decision in that case was incorporated into the decision of the case at bar by reference without redetermining the question.

The case now comes before this court on writ of error granted by the chief justice of the Supreme Court of California. Industrial Accident Commission of California appears as a plaintiff in error with Hayes' minor children for the reason that it was the principal respondent in the proceedings before the California Supreme Court in review of its decision in this case and, further, that it is authorized by the California statutes to appear by its own counsel in any proceeding in review of its decisions or affecting its jurisdiction. It has so appeared in this court in several cases, including *Industrial Accident Commission of California vs. Davis*, 259 U. S. 182.

This case has been advanced to January 7, 1924, to be heard with No. 366, *State of Washington vs. Dawson*, involving the constitutionality of the same statute.

## HISTORY OF THE QUESTION.

### *Relation of States to Federal Government in Maritime Matters Prior to 1917.*

Prior to 1917, the generally accepted view was as follows:

1. Under the reservation of a common law remedy to the state courts in the grant of judicial power to the United States district courts in admiralty matters (Secs. 24 and 256, Judicial Code), the state courts have exercised concurrent jurisdiction with the admiralty courts in practically all proceedings of admiralty and maritime nature except prize cases and proceedings *in rem* to enforce maritime liens. *The Moses Taylor*, 4 Wall. 411; *The J. E. Rumbell*, 148 U. S. 1, 12. This "saving clause" includes later statutory remedies enacted by the states. *Leon vs. Galccron*, 11 Wall. 185; *Rounds vs. Cloverport*, 237 U. S. 303.

2. Where a suit was tried in the admiralty court, the law maritime was applied as the substantive law of the case (*The Max Morris*, 137 U. S. 1), but where the suit was tried in the state court or on the law side of the federal court, it was definitely held that the state law was to be applied instead of the admiralty rules. *American Steamboat Co. vs. Chace*, 16 Wall. 522; *Atlee vs. Packet Co.*, 21 Wall. 389; *Belden vs. Chase*, 150 U. S. 674, 691; *The Hamilton*, 207 U. S. 398.

3. State statutes were permitted to apply generally to supplement or modify the maritime law. *The*

*J. E. Rumbell*, 148 U. S. 1, 12 (statute creating maritime lien for vessel in home port); *Leon vs. Galceron*, 11 Wall. 185 (statute providing remedy of sequestration); *American Steamboat Co. vs. Chace*, 16 Wall. 522 (death statute); *The Hamilton*, 207 U. S. 398 (death statute); *Anderson vs. Pacific Coast S. S. Co.*, 225 U. S. 187 (pilotage). The only cases in which state statutes were not allowed to apply were where they contravened an applicable act of congress, attempted to authorize proceedings *in rem* in a state court, or attempted to directly regulate interstate or foreign commerce. *The Moses Taylor*, 4 Wall. 411; *Hall vs. De Cuir*, 95 U. S. 485. Such state statutes not only furnished the rule of decision in proceedings in the state courts but were given effect by the federal courts in admiralty proceedings as well, at least, where the maritime law did not have a rule of its own to apply. *Peyroux vs. Howard*, 7 Pet. 324 (statute creating maritime lien); *The Hamilton*, 207 U. S. 398 (death statute).

#### *Growing Inadequacy of Maritime Law.*

The rules of the admiralty law for injuries occurring in maritime service were developed for sailors. Port workers, being *infra corpus comitatus*, came under the municipal law. Ultimately the admiralty rules were extended to cover matters occurring in harbors and interior waters, so that they have come to apply to port and harbor workers, although not altered to fit their situation. The rule of *The*

*Osceola*, 189 U. S. 158, of care and maintenance until the end of the voyage, was never made for longshoremen. Today we have the anomalous result that sailors have been taken out of the maritime rules (Sec. 33, Merchant Marine Act of 1920) but longshoremen and port workers remain under them, except for the act of congress here involved.

Our industrial development of the last fifty years has brought about much legislation to improve the condition of factory and industrial workers. Employers' liability acts, represented by the Federal Employers' Liability Act, were passed in nearly all states, to modify or supplement the common law rules for determining liability. They have in turn been superseded by workmen's compensation legislation, now adopted in forty-three of our states and by the federal government for its own employees. Act September 7, 1916, 39 Stat. 743, c. 458.

The antiquated rules of the maritime law for personal injuries are set forth in *The Osceola*, 189 U. S. 158, and summed up in *Carlisle Packing Co. vs. Sandanger*, 259 U. S. 255. As will be seen from these cases, such rules omit all protection to widows and dependents of maritime workers, allow nothing for loss of wages during disability extending beyond the end of the voyage, and give no indemnity for permanent disablement, except where the vessel is unseaworthy. All of these feature are very important factors of modern relief. The remedy provided for enforcement of rights under the maritime law is an

action in the admiralty courts, or in the state courts under the "saving clause," which remedy involves much greater delay and expense than the remedy provided by state workmen's compensation acts, usually of an informal proceeding before a board or commission. To a maritime worker, delay and expense of litigation may frequently be more prohibitive of justice than an unjust decision.

The maritime law has not shared in the amelioration of the common law by state statutes. None of the betterments provided by modern remedial legislation have been made applicable, at least to port and harbor workers. Efforts of the states to apply their workmen's compensation acts to such port employments have been made futile by the decisions of this court in *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372, and *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, each decided by a divided court. The laudable purpose is expressed in these cases of freeing the national maritime law from divergent state legislation, but the net result has been to prevent amelioration of the maritime law by state statutes of a type previously accepted by this court, such as state death statutes, state statutes creating a lien upon a vessel in her home port, etc.

The efforts of congress to modernize the law relating to maritime injuries has, as yet, been fruitless.

Three statutes have been passed to better the condition, the first of which was declared unconstitutional in *Knickerbocker Ice Co. vs Stewart*, 253 U. S.



149; the second, the Merchant Marine Act of 1920, Sec. 33, is now under attack upon constitutional grounds in the lower federal courts (*Panama R. Co. vs. Johnson*, 289 Fed. 964), and the third is now before this court in the present proceeding.

*Resume of Decisions and Statutes Since 1917.*

(1) In *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372, it was held by a bare majority of the court that the rules of the maritime law constitute the rule of decision for actions in state courts under the "saving clause," as well as in admiralty, overruling without expressly mentioning *American Steamboat Co. vs. Chace*, 16 Wall. 522; *Atlee vs. Packet Co.*, 21 Wall. 389; *Belden vs. Chase*, 150 U. S. 674; *The Hamilton*, 207 U. S. 398.

(2) In *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, decided a few months earlier by the same five to four vote, this court held that state workmen's compensation acts could not constitutionally be applied to maritime injuries because of conflict with the maritime law, in the absence of any action by congress on the subject.

At this time, state workmen's compensation acts were very new in the field of maritime law and constituted a radical departure from the previous law. On this account they may perhaps have been viewed with distrust, when the first cases involving them came to this court. They have since become a settled portion of maritime jurisprudence by adoption in

forty-three states and by the federal government for its own employees, and no reason now exists why they should not be given full favor because of their remedial features. Their validity in their general aspects has been recognized by this court in *New York Central R. R. Co. vs. White*, 243 U. S. 188.

The Jensen decision overruled contrary decisions of lower courts in the following cases:

*Kennerson vs. Thames Towboat Co.*, 80 Conn. 367, 94 Atl. 372;

*Lindstrom vs. Mutual S. S. Co.*, 132 Minn. 328, 156 N. W. 669;

*North Pacific S. S. Co. vs. Industrial Accident Commission*, 174 Cal. 346, 163 Pac. 199;

*Jensen vs. Southern Pacific Co.*, 215 N. Y. 514;

*Keithley vs. North Pacific S. S. Co.*, 232 Fed. 255;

*Bjorstad vs. Pac. Coast S. S. Co.*, 244 Fed. 634.

The only decision below to the contrary was *Schuede vs. Zenith S. S. Co.*, 216 Fed. 566, which this court later affirmed by an equally divided court in 244 U. S. 646.

(3) The act of October 6, 1917, was passed by congress to overcome the effect of *Southern Pacific Co. vs. Jensen*, congress deeming the welfare of the country to require the protection of maritime workers under the laws of their own states and that uniformity of federal rule was not desirable.

(4) This act, hereinafter called the 1917 act, was held unconstitutional by the same bare majority of

this court in *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, which we will discuss below.

(5) In *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263, a later decision, this court unanimously held that the state workmen's compensation act may apply without authority from congress to injuries occurring upon the wharf or dock to persons in maritime service, for the reason that admiralty jurisdiction in tort does not apply to injuries occurring upon the shore. The court might have held, as did the New York Court of Appeals in the same case, that the necessity for uniform regulation of interstate and foreign commerce by water required the application of a federal rule to all maritime service regardless of the *locus* of the injury. It can not be denied that the interference with commerce is just as great where a sailor or stevedore is injured upon the dock alongside his ship, in the course of his employment, as when he is hurt upon the vessel in the course of the same service. Under this view it would follow that failure of the maritime law to prescribe a remedy could be corrected only by act of congress prescribing a uniform federal remedy. This court did not, however, so hold. In its decision the test of applicability of a state workmen's compensation act was made not the nature of the service being performed at the time of injury or its relation to commerce and navigation, but whether the maritime law has at the time a rule of its own applicable to the situation. The decision

marked a radical change in the viewpoint of the court.

(6) In *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, another later decision, this court has again unanimously modified the viewpoint of the *Jensen* and *Knickerbocker* cases. In this case a carpenter was injured while completing the construction of a vessel. The vessel was afloat upon navigable waters after launching, but not yet in service. The court held that the case was within the jurisdiction of the admiralty courts in tort but, nevertheless, the state workmen's compensation act must be applied as the exclusive remedy, because the subject matter of the service was local in character, permitting the application of the local or municipal law. Even though the maritime law has an applicable rule the state law will nevertheless be applied where the subject does not involve interstate or foreign commerce or navigation.

In *Western Fuel Co. vs. Garcia*, 257 U. S. 233, this court also declared fatal injuries occurring upon navigable waters within the territorial limits of a state to be local in character for the purpose of a state death statute.

We claim, in the light of the last two decisions, that the regulation of personal injuries of port and harbor workers is not so closely connected with interstate and foreign commerce or navigation by water as to preclude congress from using its own judgment in determining whether the best interests of the

United States require a national regulation or application of the local law.

(7) The regulations more recently made by congress to meet *Knickerbocker Ice Co. vs. Stewart*, and the later decisions of this court just referred to, are:

(1) By Sec. 33 of the Merchant Marine Act of 1920, Act June 5, 1920, c. 256, 41 Stat. 998, sailors are placed under a uniform federal regulation, the Federal Employers' Liability Act.

(2) Port and harbor workers are impliedly declared by congress by the act of June 10, 1922, now before this court, not to be engaged in service in which uniformity of national regulation is advisable and are, accordingly, returned to the protection of the compensation laws of the states in which they have their permanent residence and carry on their work.

We have pointed out that the case of *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372; *Southern Pacific Co. vs. Jensen*, 244 U. S. 205; and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, met with a very vigorous protest from four members of the court. The case at bar can be determined narrowly upon differences between the present act and the act condemned in the *Knickerbocker Ice Co.* case. A broad and full consideration of the question, however, justifies reconsideration of some of the holdings in these three cases. Because of the closeness of the vote in this court, these decisions can not be said to

have yet become settled law in their entirety. The contrary tendency of the last two decisions referred to and the fact that four of the present members of the court were not upon the bench at the time these cases were decided, justify us, we believe, in respectfully asking for a reconsideration of the following questions covered in said cases: (1) Whether the work of longshoremen and other port and harbor workers is so closely connected with interstate and foreign commerce and navigation as to preclude the exercise of a legislative discretion by congress in determining whether federal or state regulations should better apply to them. (2) Whether the analogy of the Wilson Act, Webb-Kenyon Act, Assimilable Crimes Act, Pilotage Act and other federal statutes which make state laws applicable to matters within federal jurisdiction do not cover the situation now presented. (3) Why the 1922 act may not be upheld upon the reasoning employed to uphold state statutes in maritime matters such as pilotage acts, death statutes, statutes creating liens in its home port of the vessel, etc. (4) Why a state compensation act may not be upheld in death cases when the maritime law makes no provision whatever for fatal injuries. *The Corsair*, 145 U. S. 335.

We call to the attention of the court the dissenting opinions in the *Jensen* and *Knickerbocker* cases, which cover the points here made more clearly than the writer could hope to do.

**STATEMENT OF ELEMENTS OF PUBLIC POLICY  
INVOLVED.**

Congress has determined by the act of June 10, 1922, that as to injuries sustained by port and harbor workers in the course of their work, the welfare of the country would be best met by retracting the federal jurisdiction in maritime matters and allowing the states to provide the necessary regulations. There are strong reasons supporting the wisdom of this determination. At the least, there are such grounds for reasonable divergence of opinion upon the merits of the question as to prevent ousting congress from the exercise of its legislative discretion upon the question. The grounds favoring state regulation are summarized as follows:

1. Regulation of personal injuries sustained by wharf and dock workers, supply men and repair men engaged in local maritime service, indirectly and secondarily affects navigation and commerce by water rather than directly and immediately. Such regulations do not act upon the movement of vessels or transportation of commerce, but merely determine the rights and liabilities of instrumentalities of such movement arising out of local employments. In interstate commerce by land such regulation of instrumentalities unquestionably is with the states until congress acts. *Second Employers' Liability cases*, 223 U. S. 1, 54.

2. The states have a direct interest in seeing that adequate and proper rules of law are provided for the

relief of such injuries. Their relief or redress presents primarily a local problem. Harbor and port workers are not transients like sailors but are permanent residents of the states and engaged in permanent industries carried on in the harbors of the states. Their employers are also almost invariably residents and doing business in the state, such as stevedoring companies, ship repair yards, material and supply men, etc. The workers have their homes in the state and have in the state persons depending upon them for support.

As a matter of natural justice such workers are entitled to protection for themselves and their dependents equal to that given by the laws of their state to its other industrial workers.

Employers usually desire the protection of limited recovery and speedy and inexpensive procedure given by state workmen's compensation acts in preference to the hazards and expense of litigation with unlimited recovery, involved in suits under the admiralty law. They are entitled as a matter of justice to claim the same protection of the laws of their state as are given to its other industries.

The state is entitled to have protection against its disabled workers becoming public charges and burdens upon its institutions, its public and private charities. If a stevedore is injured in the course of his employment, the maritime law does not carry him over his period of adversity. The burden falls upon the state. If he is killed, maritime law does not de-



fray the cost of support of his children and widow in public institutions or by private charities. It falls upon the state. The cost of such injuries is purely a local burden.

Assuming the federal government to have substantial interest in the proper regulation of navigation and maritime commerce, the states have a like interest in the protection of their citizens. It is proper for congress to balance the opposing interests of state and nation and to determine in its discretion which interest should receive the greater recognition.

3. A uniform federal act for longshoremen is impracticable. State laws apply to injuries occurring upon the wharf and the federal law, but for the 1922 act, to injuries occurring upon the vessel. *State Industrial Commission of N. Y. vs. Nordenholt Corporation*, 259 U. S. 263. The service or employment, however, and not the *locus* of injury, is the natural unit for jurisdiction. A longshoreman discharging cargo is rendering service in connection with the movement of maritime commerce, equally when loading his truck in the hold of the ship, when trucking his load down the gang plank, and when piling the cargo upon the wharf. The necessity for uniformity of maritime law is no greater when he goes up the gang plank than when he goes down it, when on the ship or on the wharf. The locality test of maritime jurisdiction has no relation to the need for uniform federal regulation. The water line is not a practicable point to separate the two jurisdictions.

There is an advantage to employers of labor engaged in local maritime work in having their entire liability determined under one act rather than to have a divided liability, fluctuating between state and federal laws. Defendant in error James Rolph Company, for instance, maintains docks and storage facilities in San Francisco to handle coal imported by it. Its office force, officers, bookkeepers, janitors, weighers, dock masters, deliverymen and laborers upon the wharf are wholly within state jurisdiction. Its longshoremen are within the state jurisdiction until they reach the middle of the gang plank and then would pass under the admiralty law upon entering the ship. It is more convenient for it to have its entire staff of employees, other, possibly, than members of crews of vessels, governed by the same state law than to be obliged to face proceedings under the admiralty law at one time and under the state compensation act at another. The business conducted in the port is the natural unit of jurisdiction and should be wholly under one law. The federal government can not supply a rule to cover the entire business, and the states can.

Similarly, there is a certain large sugar refining company on San Francisco Bay which imports raw sugar in vessels, discharges it at its refinery and there refines it. Its refining operations are wholly under the state law and it will be advantageous to it to have all its refinery employees, including those engaged in

the discharging of raw sugar from its boats at the refinery, classed together under the same law.

Again, it is universal today for employers of labor to protect themselves and their workers by policies of workmen's compensation insurance. If the federal government enacts a federal compensation act for stevedores injured upon vessels, it will provide some form of protective insurance. The same insurance company will not, in all probability, be able to insure under both federal and state laws in one policy for one premium. In the states of Oregon, Washington and Ohio, among others, the state itself provides the insurance and does not insure against liability under the law maritime. Employers would be required to take out one insurance policy under the state law for injuries to their longshoremen while on the dock and a separate policy of insurance under the federal law for injuries occurring to the same men engaged in the same service while in the ship. The proportion of time a given workman will be on the ship and on the wharf can not be accurately measured, nor can accidents upon the gang planks be computed actuarially to provide a fair division of hazard and premium under the two laws. The work is not divisible for the purpose of insurance at the water line. The entire service of the stevedore is the only practicable insurable unit. This requires one law for the whole service.

4. Jurisdictional conflicts will be increased if congress is compelled to provide a federal rule for port

workers. This court has had experience, in jurisdictional conflicts under the Federal Employers' Liability Act, with the question of whether a railroad employee is engaged at the moment of his injury in interstate or local commerce. Questions equally difficult will arise if the federal government be compelled to assume jurisdiction over port employees injured upon navigable waters. Questions of gang plank injuries, of local or national character of service under *Grant Smith-Porter Ship Co. vs. Rohde, supra*, of injuries in and about dry docks and repair yards, of services to vessels out of commission, etc., all present jurisdictional conflicts which congress may properly desire to avoid.

5. The preference of both employers and employees in harbor work is for uniform application of the state law to their entire employment. Following the decision in *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, stevedoring companies in San Francisco and Los Angeles harbors represented to the Industrial Accident Commission of California that they preferred the operation of the state workmen's compensation act, with its limited recovery and inexpensive procedure, to the uncertainties and costs of litigation of suits in admiralty. They requested permission to continue under the state workmen's compensation act by voluntary arrangement, offering to pay the premiums due upon workmen's compensation insurance if the insurance companies would agree to pay the benefits due under the state

law to their workmen. An arrangement of this nature was worked out and payments were continued under the state compensation act wherever the injured or his dependents would give release of rights in admiralty in consideration for the payment to him of compensation benefits. Advantages of this arrangement are (1) better labor conditions, the longshoremen being better satisfied with the protection of the state law as accorded to all other workers in the port; (2) relief from excessive costs of litigation and uncertainties of recovery; (3) economy of administration with all employees under one law.

Upon practical considerations, therefore, there are ample reasons sustaining the choice made by congress to warrant leaving the determination of the question of policy involved to the legislative discretion of congress.

The same reasons of policy apply to the second contention raised in this brief, that employers and employees, in port and harbor maritime occupations at least, should be free to adopt the provisions of an elective state workmen's compensation act as the measure of their rights and duties whenever they so desire. The uniformity of the maritime law is not offended by the voluntary adoption of a different standard of liability by the parties immediately concerned. The considerations of policy cited above show the desirability of not prohibiting employers and employees in these occupations from entering into or continuing this arrangement between themselves.

### OUTLINE OF CONTENTIONS.

Our contentions are:

1. Congress may withdraw the exercise of federal jurisdiction from any portion of the field of maritime law, so as to permit the states to function in the unoccupied field under their police power. The constitution permits congress to secure uniformity of regulation of shipping by national law to the extent that congress considers it practicable to do so, but does not compel congress to provide national regulation exclusively, where congress does not consider it practicable or wise to do so. The federal jurisdiction is sufficiently vindicated by placing full power to control in congress, to be exercised by it in its discretion.

2. It has so acted in the act of June 10, 1922. This action does not constitute a delegation of legislative power, as the states in entering the field act under their police power and not under federal authority.

3. The requirement for uniformity of maritime law does not prevent congress from taking this action, under the analogy of similar situations relating to interstate commerce by land and similar state and federal statutes relating to maritime matters, such as state death statutes, the Pilotage Act, the Wilson Act, the Webb-Kenyon Act, the Assimilable Crimes Act and the Conformity Act.

4. Nothing in the maritime law prevents employers and employees in port occupations, at least, from voluntarily adopting by express or implied contract

the provisions of a state workmen's compensation act as the measure of their rights and duties.

## ARGUMENT.

### I.

#### ACT OF JUNE 10, 1922, IS CONSTITUTIONAL.

##### A. THE DECISIONS OF THIS COURT IN SOUTHERN PACIFIC CO. VS. JENSEN, 244 U. S. 205, AND KNICKERBOCKER ICE CO. VS. STEWART, 253 U. S. 149, DO NOT INVALIDATE THE PRESENT ACT.

1. *Southern Pacific Co. vs. Jensen* does not make the 1922 act invalid.

In this case, the court held the New York Workmen's Compensation Act, in the absence of any congressional action upon the subject, to be inapplicable to maritime injuries generally because of conflict with the federal maritime law and the federal constitutional admiralty and maritime jurisdiction. The grounds of this decision, as we understand them, with comments upon their applicability to the 1922 act, are:

(a) *That the general maritime law is a part of the national law and includes and excludes state legislation to the same extent as an act of congress upon the subject.*

Accepting this statement, it involves no determination upon the power of congress to repeal portions of the maritime law and leave the field thus vacated to the states. In the *Jensen* case, the court was dealing with a situation in which congress had not yet acted upon the subject. Congress has now acted.

We are concerned only with its power to act. The general maritime law, comparable in this respect to the common law of the states, is no less subject to the power of repeal of congress than are its own statutes. By repealing portions of the substantive maritime law, congress has in effect made injuries sustained by port and harbor workers nonmaritime and thereby removed all possibility of conflict between the state laws and the federal jurisdiction.

*(b) That the application of the state compensation acts to foreign vessels would defeat the uniformity of federal regulation in matters national in scope which it was the object of the constitution to secure and would harm and impede freedom of commerce and navigation with foreign countries.*

The present act eliminates this objection. By excluding from its operation masters and members of crews of vessels and thereby limiting its effect to local port and harbor workers, the possibility of interference with foreign shipping becomes remote. Foreign vessels in American ports have their stevedoring performed almost wholly under contract with local stevedoring companies. They have not the facilities for supplying equipment for loading and unloading their vessels and for getting together gangs of workmen under their direct employment. The only exception is where the steamship line has its own terminal facilities in an American port, such as wharfs and docks. In this case, it is to that extent conducting a local enterprise. Its local employees



are undoubtedly under the state compensation act whenever injured upon the wharf or dock. To the extent of operation of its permanent and port facilities, it subjects itself to the municipal law in substantially all respects and is in no different position from any other local maritime enterprise.

To impose one liability in place of another upon a domestic stevedoring company, a domestic repair yard or a domestic marine supply concern, or even upon a steamship line owning its terminal facilities and having a port staff, does not interfere with the operation of foreign vessels in any field in which uniformity of federal regulation is greatly desirable. The primary object of the maritime law is to provide proper regulations for the movement of commerce by water. The regulation of the rights of port and harbor workers arising from personal injuries has no such direct relation to this movement. The exclusion of crews of vessels from the new statute takes it out of the objection of interference with foreign vessels.

Further, the statement of possible interference by the state acts with navigation invokes reference to the decisions of this court striking down or upholding state legislation upon the claim that it may amount to a regulation of interstate or foreign commerce. While these decisions were based upon federal jurisdiction under its "commerce clause" instead of the admiralty power, they become immediately applicable upon the suggestion that commerce

by land or water is being interfered with. Commerce includes navigation (*Gibbons vs. Ogden*, 9 Wheat. 1), and the power to regulate commerce includes the power to regulate maritime matters generally. *The Lottawanna*, 21 Wall. 558, 577.

Under the commerce clause, it is held that the regulation of instrumentalities of commerce is not, *per se*, a regulation of commerce itself, so that the states are free to act until congress occupies the field. *Robbins vs. Shelby Co. Taxing District*, 120 U. S. 489. This is especially true of personal injuries to persons employed in interstate commerce by land, *Second Employers' Liability* cases, 223 U. S. 1, 54, and of injuries sustained by persons employed in maritime service, *Sherlock vs. Alling*, 93 U. S. 99 (death statute); *Valley S. S. Co. vs. Wattawa*, 244 U. S. 202 (workmen's compensation act). The requirement of noninterference by the state with commerce can be no greater under the admiralty power than under the commerce power, as it is the same commerce that is being regulated in either event. Interstate and foreign commerce by land calls for no less protection than such commerce by water. The 1922 act involves no interference with foreign commerce.

(c) *That the state compensation acts are inconsistent with the policies adopted by congress for encouragement of investment in shipping.*

A later act of congress supersedes its earlier statutes so far as it may be inconsistent with them. If

there be inconsistency, the act of June 10, 1922, takes precedence.

(d) *That the remedy of the state compensation act, being novel and incapable of enforcement by the ordinary processes of any court, is not within the "saving clause."*

The act of 1922 expressly amends the "saving clause" to include state workmen's compensation acts in the situations named, so that there can no longer be any doubt of the scope of the "saving clause."

(e) *The court conceded by implication in the Jensen case that congress had the power here claimed.*

One ground of the decision is indicated in the reference by the court in the *Jensen* case to the liquor cases, *Bowman vs. Chicago & N. W. Ry. Co.*, 125 U. S. 465; *Vance vs. Vandercook Co.*, 170 U. S. 438, and *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311. It states the rule declared in them that where the subject is national in scope, the failure of congress to provide a regulation will be construed as an implied declaration by congress that the subject shall be free from state regulation. The plain implication is that if congress affirmatively states its desire that the subject be regulated by state action, such desire will prevail. This is further reinforced by the fact that the very cases cited by the court are all cases in which it sustained the validity of acts of congress (Wilson and Webb-Kenyon acts) returning jurisdiction to the states upon a subject

matter which it had previously held to be national in character within the rule quoted above. Nothing in *Knickerbocker Ice Co. vs. Stewart* opposes this view.

2. *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, does not make the 1922 act invalid.

In this case, a bare majority of the court held unconstitutional the act of October 6, 1917, which amended the "saving clause" contained in sections 24 and 256 of the Judicial Code to save to suitors, in addition to their common law remedies, rights and remedies under the workmen's compensation act of any state. We at this point submit only the contention that the changes made by congress in the act of 1922 take it out of the objections made by the court in the *Knickerbocker* case. The grounds of this decision, as we construe them, are:

(a) *That the act of 1917 left the maritime law in full force and effect and merely provided an election on the part of the injured maritime worker to claim under the maritime law or under a state workmen's compensation act at his pleasure. Under these circumstances, congress can not delegate to the states authority to contravene the maritime law where it applies.*

That the court so interpreted the 1917 amendment is apparent from its statement (page 161, 253 U. S.) that:

"A mere reservation of partially concurrent cognizance to such courts (the state courts) by an act of congress conferring an otherwise exclusive

jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the states.”

Again, the court refers, page 161, note, to the report of the senate committee upon the bill, in which it is clearly set forth that the bill was intended to give to claimants an election between the maritime or state remedies in each case. The court also states (same page) that the field was not left unoccupied by the failure of congress to provide a national statutory rule, as the law maritime was itself occupying the field.

The 1922 amendment cures this defect by making the compensation remedy the exclusive remedy where applicable. It has, therefore, repealed all provisions of the law maritime concerning personal injuries sustained by port and harbor maritime workers in states having workmen's compensation acts. The substantive law maritime is no longer in the field; no federal rule exists with which the state rule can conflict. The more recent decision of this court in *State Industrial Commission of N. Y. vs. Nordenholt Corporation*, 259 U. S. 263, reinforces this view, as the existence of a gap in the maritime law is there held sufficient to warrant the application of the state workmen's compensation act to a matter strongly of maritime concern and national in scope.

(b) The court expresses a doubt, page 159, 160-3, as to whether congress evidenced in the 1917 amendment an intention to create new substantive rights by

an amendment to a mere clause saving jurisdiction. This doubt is cured by express language in the new act, making the substantive law of the state the exclusive remedy where applicable.

(c) *That the object of the constitutional grant of maritime jurisdiction was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation and to establish as far as practicable uniform rules throughout the union. That, therefore, congress must itself supply the rule (as far as practicable) and can not delegate legislative power to the states to do so.*

We have contended above that it is not practicable to apply a uniform federal regulation to personal injuries sustained by port and harbor workers, and that congress may so determine.

The act of 1922 differs from the 1917 act in that it differentiates members of crews of vessels from port and harbor workers. The former it places under an improved federal rule (non-maritime); the latter under state law. The statute before the court in the *Knickerbocker* case applied to all maritime workers indiscriminately. By reducing the class of workers affected by the 1922 act to port workers (whose injuries upon land are under the state law anyhow), the problem is very different from that before the court in the *Knickerbocker* case. The service of port workers to whom the new act applies is not as closely connected with foreign commerce as in that case.

Congress may determine, in the exercise of its legislative power, whether uniform federal regulation is in fact desirable.

Questions raised by the opinions in the *Jensen* and *Knickerbocker* cases but not satisfactorily explained are (1) Why a state death statute can be applicable to personal injuries in all maritime employments while a state workmen's act can not be applied to stevedores' injuries; (2) Why a state workmen's compensation act may not be applied in fatal cases when the maritime law makes no provision for death cases; (3) Why any higher degree of uniformity should be required for the regulation of navigation or commerce by water than for the regulation of interstate and foreign commerce by land; (4) Why the regulation of personal injuries sustained by persons employed in maritime service should be held a direct burden upon commerce when a regulation of similar matters more closely related to commerce such as pilotage (*Cooley vs. Board of Port Wardens*, 12 How. 299), liens upon vessels in their home ports (*The Lottawanna*, 21 Wall. 558), death statutes (*The Hamilton*, 207 U. S. 398), state workmen's compensation act (*Valley S. S. Co. vs. Wattawa*, 244 U. S. 202), are held to be only incidental to and not a regulation of commerce and within the power of the states until congress acts.

**B. THE ACT OF JUNE 10, 1922, IS VALID UPON THE GROUND THAT CONGRESS HAS POWER TO RETRACT THE EXERCISE OF FEDERAL MARITIME JURISDICTION AND TO REPEAL PORTIONS OF THE SUBSTANTIVE MARITIME LAW IN THE FIELD OF PERSONAL INJURIES SUSTAINED BY PORT AND HARBOR WORKERS SO THAT THE STATES MAY PRESCRIBE A REMEDY FOR SUCH INJURIES UNDER THEIR POLICE POWERS, FREED FROM CONFLICT WITH FEDERAL JURISDICTION.**

*Proof of Existence of This Power.*

*1. Nature of state and federal powers.*

The power of the states to regulate personal injuries occurring within their borders is derived from their police power. *New York Central R. R. Co. vs. White*, 243 U. S. 188; *Wilson vs. McNamee*, 102 U. S. 572. The power of the federal government comes from the express grant of authority in the constitution to legislate upon interstate and foreign commerce and the implied grant to legislate upon matters of admiralty and maritime cognizance. Neither state nor federal government exercises any power delegated by the other. The power of each is derived independently from the same competent source. When both attempt to apply their regulation to the same subject at the same time, a conflict results which is reconciled by the provision of the federal constitution making the constitution, laws and treaties of the United States supreme under such circumstances. The fact that the federal law prevails does not prove the states incompetent. *Smith vs. Alabama*, 123 U. S. 465, 473. It only proves that the



federal regulation is superior in the event of conflict with a state regulation otherwise within the sovereign power of the state.

This is well illustrated in the following quotation from Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat. 1, 194:

“So, if a state in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means.”

Again at page 210:

“\* \* \* it has been contended that if a law passed by a state, in the exercise of its acknowledged sovereignty comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself but of the laws made in pursuance of it, \* \* \*. In every such case, the act of congress, or the treaty, is supreme; and the case of the state, though enacted in the exercise of powers not controverted, must yield to it.”

2. *It is not the existence of a power in the federal government but its exercise which bars state action.*

In *Sturges vs. Crowninshield*, 4 Wheat. 122, this

court through Chief Justice Marshall said, speaking of bankruptcy laws, which are expressly required by the constitution to be uniform:

“If this be correct, it is obvious that much inconvenience would result from that construction of the constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to congress. It may be thought more convenient that much of it should be regulated by state legislation, and *congress may purposely omit to provide for many cases to which their power extends*. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the union may not reach. But be this as it may, *the power granted to congress may be exercised or declined as the wisdom of that body shall decide*. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.” (Italics ours.)

Speaking especially of admiralty law and navigation, this court stated in *Cooley vs. Board of Port Wardens*, 12 How. 299, 318, with reference to pilotage:

“\* \* \* that, it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states and that the states may legislate in the absence of congressional regulations.”

In *Butler vs. Boston, etc., S. S. Co.*, 130 U. S. 527, it holds, speaking through Mr. Justice Bradley:

“It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and can not be affected or controlled by legislation, whether state or national. \* \* \* But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as congress may from time to time have adopted.”

In *Gilman vs. Philadelphia*, 3 Wall. 713, 724:

“Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States.  
\* \* \*

It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.”

3. Since congress may omit to exercise the full national power, it may with equal propriety withdraw a power previously exercised, either statutory

or unwritten in character. It has done so with the approval of this court in the following cases.

In *Gibbons vs. Ogden*, 9 Wheat. 1, this court sustained by way of argument the constitutionality of acts of congress of 1792 and 1794, directing federal officers to conform to and aid in the execution of the quarantine and health laws of the states, notwithstanding resulting interference with commerce and navigation.

In *Cooley vs. Board of Port Wardens*, 12 How. 299, this court sustained an act of congress providing that pilotage, a matter intimately associated with navigation and maritime law, should continue to be governed by state regulations. (In both these cases, congress withdrew the exercise of federal jurisdiction from a field involving interstate commerce, or navigation, or both. Congress can not change the scope of the constitutional grant of power. It can not exercise powers not given it by the constitution or preclude itself from resuming the exercise of powers conferred. But within the limits of the constitutional grant, it may exercise or decline to exercise the granted powers in its discretion.)

In *In re Rahrer*, 140 U. S. 545, this court sustained the constitutionality of the Wilson Act, which provided that all intoxicating liquors transported into any state shall upon arrival become subject to the laws of the states. In so doing, congress set aside the previous decision of this court in *Leisy vs. Hardin*, 135 U. S. 100, holding that the regulation of imports

of intoxicating liquors into the different states was a regulation of interstate commerce, which the states could not exercise, the silence of congress being equivalent to its declaration that the subject matter should remain free.

In *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311, this court sustained the constitutionality of the Webb-Kenyon Act, which prohibited the importation of liquors into states where prohibited by the laws of the state.

4. In general, congress possesses paramount power to fix and determine the maritime law, this power including the power of repeal.

*In re Garnett*, 141 U. S. 1, 12; *The Lottawanna*, 21 Wall. 558, 577; *Butler vs. Boston S. S. Co.*, 130 U. S. 527; *Southern Pacific Co. vs. Jensen*, 244 U. S. 205.

**RETRACTION OF THE FEDERAL MARITIME JURISDICTION INVOLVES NO DELEGATION OF LEGISLATIVE POWERS TO THE STATES.**

In the *Knickerbocker Ice Co.* case, this court suggests that the 1917 act of congress involved a delegation of legislative power to the states. The court was there speaking of a statute in which the maritime law was stated to have been left in the field but claimants were authorized to elect between a claim under the state workmen's compensation act or the maritime law. This indirectly gave to the states the power to supersede applicable rules of the maritime law by their own statutes. This situation does not exist in the present case. By the 1922 act, state workmen's compensation acts are made exclusive where applicable. In states having such acts, there is no maritime law to conflict with the state statute. Where the state can make its rules applicable to maritime matters, it does so under its own police power and not through the grant of any authority from congress to legislate, as pointed out above.

**CONGRESS IS NOT PROHIBITED FROM LEAVING THE  
FIELD OF REGULATION OF PERSONAL INJURIES  
OF PORT WORKERS OPEN TO STATE ACTION BY  
REASON OF ANY INTERFERENCE WITH INTER-  
STATE AND FOREIGN COMMERCE.**

In the *Jensen* and *Knickerbocker* cases, this court refers to possible interference with maritime interstate and foreign commerce by the regulation of personal injuries in maritime service by state compensation acts. We have referred to this contention briefly in our preceding discussion of the *Jensen* case. The necessity for freeing interstate and foreign commerce from state created burdens, greater or less as the case may be, is no greater for water commerce than for land commerce. The nature of the commerce and the extent of interference with it is the same whether it move by water or rail. Cases defining permissible interference under the commerce clause by the states in the aid of their local weal are therefore equally applicable to commerce by water as far as the question of permissible interference is concerned.

We are not here concerned with questions of domestic commerce. This court has held that a uniform rule is only required for maritime matters to the extent that interstate or foreign commerce may be involved. *Southern Pacific Co. vs. Jensen, supra*. Domestic commerce by water presents a local problem, to which admiralty jurisdiction may extend, but in which the state may legislate until congress acts. *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S.

469; *Western Fuel Co. vs. Garcia*, 257 U. S. 233; *The Minnesota Rate* cases, 230 U. S. 352; *Manchester vs. Mass.*, 139 U. S. 240; *Wilmington Transp. Co. vs. Calif. R. R. Comm.*, 236 U. S. 151.

It is well settled by the decisions of this court that incidental regulations by the states of matters involving their own security or the welfare of their citizens are not void, even in the absence of action by congress, because they may incidentally affect interstate or foreign commerce. *The Minnesota Rate* cases, 230 U. S. 352.

In *Sherlock vs. Alling*, 93 U. S. 99, 103, this court held:

“And in the application of the principle it makes no difference where the injury complained of occurred in the state, *whether on land or on water*. General legislation of this kind (death statute) prescribing the liabilities or duties of citizens of a state without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. \* \* \*

“In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution. \* \* \*



“\* \* \* and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, *whether on land or water*, or engaged in commerce, foreign or interstate, or in any other pursuit.” (Italics ours.)

In the field of interstate commerce, it is established that the regulation of personal injuries sustained by employees working at the time in interstate or foreign commerce is within the power of the states until congress acts. Second *Employers Liability* cases, 223 U. S. 1, 54. See also *Hull vs. De Cuir*, 95 U. S. 485; *Huus vs. New York, etc., S. S. Co.*, 182 U. S. 392; *Nashville, etc., Ry. vs. Alabama*, 128 U. S. 96; *Vandalia R. R. Co. vs. Public Service Comm.*, 242 U. S. 255; *Hennington vs. Georgia*, 163 U. S. 299.

In *Valley S. S. Co. vs. Wattawa*, 244 U. S. 202, this court, through Mr. Justice McReynolds, sustained the application of a state workmen's compensation act to the injury of a deck hand occurring on board a vessel as against the claim of interference with commerce under the commerce clause. This decision alone would seem to dispose of the contention of interference with commerce by state compensation acts under the 1922 act of congress.

**THE ACT IS NOT VOID FOR ONE OF UNIFORM  
OPERATION.**

The objection is urged in one decision below upon this question (*The Canadian Farmer*, 290 Fed. 601), that the act of June 10, 1922, is void because it does not prescribe the same rule in every state, *i. e.*, that congress can neither provide a different rule for each state depending upon the different state laws nor provide that the state workmen's compensation acts shall govern in such states as have compensation acts and the law maritime in other states.

The law maritime is notoriously incomplete. It contains no provisions for injuries occurring upon land to persons performing maritime service. It contains no provision for fatal injuries. It contains none of the statutory improvements and ameliorations provided by state employers' liability or workmen's compensation statutes or by the federal employers' liability act. To meet this situation, congress chose to permit the improved laws of the states to govern where the states had modern legislation upon the subject, *i. e.*, state workmen's compensation acts. In states not possessing such acts, the law maritime was presumed to give as good a remedy as that provided by state laws and was, therefore, retained.

Congress had jurisdiction to so determine. We are not concerned with the wisdom of this action of congress but only with its power to act. *Hamilton*

vs. *Ky. Distillery Co.*, 251 U. S. 146, 161; *Lottery cases*, 188 U. S. 321, 363.

(a) The constitution contains no express requirement for uniformity of federal laws except in special cases, as in the following quoted provisions:

“To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.” (Art. I, Sec. 8, subdivision 4.)

“But all duties, imposts and excises shall be uniform throughout the United States.” (Art. I, Sec. 8, subdivision 1.)

The making of specific requirements for uniformity in certain cases excludes such requirement in the remaining cases, of which the express power to regulate power and the implied power to fix and determine the maritime law are included. *Inclusio unus exclusio alterius*. The constitution does not itself require uniformity in the latter case. It leaves the matter to the discretion of congress, after conferring upon it full authority to act.

(b) Congress has regularly exercised the power of making different requirements in different states, depending upon the laws of the states, with the invariable approval of this court where a question has been raised.

The Pilotage Act (act of congress of August 7, 1794, 2 Laws U. S. C. 9, Sec. 4) declared that pilotage in the ports of United States shall be regulated by state laws. Naturally different states have different

laws and some may have no statutory provision on the subject. The vaildity of this statute has been upheld in many cases including *Hobart vs. Drogan*, 10 Pet. 108; *The China vs. Walsh*, 7 Wall. 53; *Coolcy vs. Board of Port Wardens*, 12 How. 299; *Gilman vs. Philadelphia*, 3 Wall. 713, 714.

The Wilson and Webb-Kenyon acts, referred to above, provide in effect that such states as have prohibitory laws may interfere with interstate commerce in intoxicating liquors, and for all other states the traffic in such liquors is free from regulation.

The Assimilative Crimes Act provides that the criminal laws of the states shall, in the absence of a federal regulation, apply and be enforced by the federal courts over crimes committed in federal districts, forts, etc. This act was sustained in *U. S. vs. Press Publishing Co.*, 219 U. S. 1, 9.

The Conformity Act provides that the procedure of the United States district courts in cases at law shall be governed by the statutes of the state in which the court is held. It was sustained in *Amy vs. Watertown*, 130 U. S. 301, and other cases.

The acts of congress of 1796 and 1797 directed federal officers to conform to and enforce state quarantine laws. It was sustained by way of argument in *Gibbons vs. Ogden*, 9 Wheat. 1.

Similarly the fact that some state statutes may give a lien upon vessels in their home ports and others not, so that the admiralty rule will be different in different states, is held not to bar such legislation.

*The General Smith*, 4 Wheat. 438; *The Lottawanna*, 21 Wall. 558. The fact that some states may have death statutes and others none and that the death statutes may differ in different states does not prevent their application in maritime cases. *Sherlock vs. Alling*, 93 U. S. 99.

The constitution therefore does not make uniformity compulsory.

**THE 1922 ACT IS IN FACT OF UNIFORM APPLICATION.**

The Wilson Act, surrendering jurisdiction over interstate commerce in alcoholic liquors in such states as have state prohibitory laws, presents a parallel situation. This court in *In re Rahrer*, 140 U. S. 545, held the Wilson Act to be of uniform application, saying:

“It (congress) has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.”

In *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, this court commented upon the Webb-Kenyon Act to the same effect, saying:

“It is true the regulations which the Webb-Kenyon act contains, permit state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of congress, *i. e.* congress itself forbade shipments of a designated character.”

See also *The Aurora*, 7 Cranch. 382;

There is no difference between returning to the states the power to apply their own divergent laws in the cases cited above and the power here exerted, to return to the states the power to apply their state workmen's compensation acts in states having such acts.

**THE ACT IS NOT VOID BECAUSE IT LIMITS THE JURISDICTION OF THE FEDERAL ADMIRALTY COURTS.**

It is contended by Judge Ervin, D. J., in *Farrel vs. Waterman S. S. Co.*, 286 Fed. 284; 291 Fed. 604, that the grant of admiralty jurisdiction to the federal courts comes from the constitution direct and that congress can not modify or take away from such courts their power to determine longshoremen's injuries. On the other hand, Judge Groner, D. J., has decided in *Carr vs. S. S. Sarland*, 1 American Maritime Cases 158, that the jurisdiction of the United States district courts is statutory and that they can have no jurisdiction not expressly given them by congress.

This question is not strictly before the court as it would not avoid the 1922 act in the cases now before this court to hold that the state workmen's compensation act may be enforced by proceedings in admiralty as well as before state courts and commissions. *In re Garnett*, 141 U. S. 1. The question is, however, worthy of further consideration.

If congress has the power to repeal portions of the substantive maritime law, it would seem to follow

that it could deprive the district courts of jurisdiction in those cases in which the substantive maritime law is repealed. The jurisdiction of the federal courts in admiralty is not based upon the maritime character of the subject matter or locality but upon the existence of a substantive maritime law which the court can enforce. *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263; *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469. If there be a hiatus in the law maritime, there is nothing upon which the maritime courts can act.

Passing this question, it is well established by the authorities that the inferior federal courts can exercise no jurisdiction not conferred upon them by specific acts of congress and that congress is not compelled to confer the entire judicial power of the United States upon the courts created by it. The jurisdiction of the inferior federal courts is statutory only.

(1) The "saving clause" contained in Secs. 24 and 256, Judicial Code, is complete proof of this. By it, congress has given to the state courts concurrent jurisdiction over all maritime matters except proceedings *in rem* and prize cases. If the federal constitution confers *exclusive* jurisdiction upon the federal courts in admiralty matters, the state courts have been exercising an illegal jurisdiction for one hundred thirty-four years. The constitutionality of the "saving clause" has been upheld by this court many

times, including *Schoonmaker vs. Gilmore*, 102 U. S. 118.

(2) After *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, *supra*, Rohde's claim was treated as relegated to the state industrial commission in 217 Pac. 267, following the decision of this court.

(3) In *Kline vs. Burke Const. Co.*, 43 S. Ct. 79, it is stated:

"Only jurisdiction of the supreme court is derived directly from the constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the constitution. *Turner vs. Bank of North America*, 4 Dall. 8, 19; *U. S. vs. Hudson and Goodwin*, 7 Cranch. 32; *Sheldon vs. Sill*, 8 How. 441, 448; *Stevenson vs. Fain*, 195 U. S. 165. The constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of congress to confer it. *The Mayor vs. Cooper*, 6 Wall. 247, 252. And the jurisdiction, having conferred may, at the will of congress, be taken away in whole or in part \* \* \*."

In *Sheldon vs. Sill*, 8 How. 441, 443, it is held:

"Courts (federal) created by statute have no jurisdiction except such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred upon another or withheld from all."



To the same effect see

*The Mayor vs. Cooper*, 6 Wall. 247;  
*U. S. vs. Bevans*, 3 Wheat. 336;  
*U. S. vs. Hudson*, 7 Cranch. 32;  
*McIntyre vs. Wood*, 7 Cranch. 504;  
*The Assessor vs. Osborns*, 9 Wall. 567;  
*Stevenson vs. Fain*, 195 U. S. 165;  
*Kentucky vs. Powers*, 201 U. S. 1;  
*Ex parte Wisner*, 203 U. S. 449.

This doctrine is specifically sustained in maritime matters in *U. S. vs. Bevans*, 3 Wheat. 336. This court there held that the grant by the constitution of jurisdiction on admiralty and maritime matters to the United States courts was not sufficient to vest the court with jurisdiction over the offense there involved (committed on a United States warship upon navigable waters in Massachusetts) because congress had not conferred it upon any particular court in that case. See also *Manchester vs. Mass.*, 139 U. S. 240, and cases there cited.

The court in *Farrel vs. Waterman S. S. Co.* bases its decision upon the authority of no decided cases other than *Southern Pacific Co. vs. Jensen* and *Knickerbocker Ice Co. vs. Stewart*, neither of which touch this phase of the question. In construing the constitution, Judge Ervin lays stress upon the word "all" contained in the grant of jurisdiction over "all cases of admiralty of maritime jurisdiction." The word "all" in the grant is intended, however, to permit congress to take over the whole field in its discretion, and not to provide that congress can not leave

some portion of the field undisposed of if it so desires. The provision has had this uniform construction in decisions sustaining the validity of the "saving clause" by which congress leaves a considerable jurisdiction in maritime matters to the states. *U. S. vs. Bevans, supra*, also rules squarely against this construction.

If the word "all" has the effect contended for, it should have the same effect in the parallel grants contained in Sec. 2, Art III of the constitution as, for instance, "to *all* cases in law and equity arising under this constitution, the laws of United States and treaties made," etc.; and "to *all* cases affecting ambassadors, other public ministers and consuls." We know, however, that state courts uniformly determine questions arising under the constitution, laws and treaties of the United States. In *Knickerbocker Ice Co. vs. Stewart, supra*, it is said:

"Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duties so require. Const. Art. VI, Cl. 2; Second *Employers' Liability* cases, 223 U. S. 1."

Ambassadors, ministers and consuls may also be authorized by congress to sue in state courts. *Bors vs. Preston*, 111 U. S. 252; *Wilcox vs. Luco*, 118 Cal. R. 639, 45 Pac. 676. The word "all" is, therefore, a word of grant, not a word of limitation.

**C. THE VALIDITY OF THE ACT IS SUSTAINED UPON THE GROUND THAT THERE IS A REASONABLE BASIS FOR DIVISION OF OPINION AS TO WHETHER THE PUBLIC WELFARE REQUIRES THE APPLICATION OF A FEDERAL RULE TO THE RELIEF OF PERSONAL INJURIES SUSTAINED BY PORT AND HARBOR WORKERS. THE DETERMINATION OF THIS QUESTION IS WITHIN THE LEGISLATIVE POWER OF CONGRESS.**

Whether the public welfare would be most advantaged in the particular case by a uniform federal rule or by the rules of the states in which they reside is in the last analysis a question of sound judgment, public policy and legislative discretion. Being founded upon considerations of fact, it is primarily a legislative, not a judicial question. *Until Knickerbocker Ice Co. vs. Stewart, this court in considering the necessity for conformity went no further than to construe the effect of the silence of congress in determining its intention to leave the subject matter to the state or not.* The *Knickerbocker* case holds only that congress can not leave the maritime law in the field and at the same time authorize the states to give a concurrent legislative remedy, and does not hold that congress may not declare and determine the policy in a case freed from this complication. In all cases decided by this court involving the question, except as possibly *Knickerbocker Ice Co. vs. Stewart*, the determination of congress is accepted as controlling (cases involving Wilson Act, Webb-Kenyon Act, Pilotage Act and other statutes referred to above).

In general, the power is in congress and not the courts to determine questions of policy and expediency, of fact, and of the desirability of governmental action. U. S. Const. Art. I. The courts may not pass upon the necessity for the exercise of a power possessed. *Lottery case*, 188 U. S. 321, 363; *Johnson vs. Gearlds*, 234 U. S. 422. The discretion is vested in congress to determine whether to apply a uniform federal law to matters involving interstate and foreign commerce or to leave the matter to the states. *Second Federal Employers' Liability cases*, 223 U. S. 1, 51. If modification be needed of the previous law, the power is placed in congress, not the courts. *Ouachita Packet Co. vs. Aiken*, 121 U. S. 444, 448.

The question here involved as to whether regulation of longshoremen's injury can be better handled by the nation or the states partakes largely of a political question as it involves a conflict between sovereign political organizations. Upon political questions, the judgment of congress is always accepted as final. *Luther vs. Borden*, 7 How. 1. The distribution of powers between state and federal governments, where the question depends upon considerations of public welfare and balancing of interests as distinguished from a pure question of construction of constitutional language, involves some elements of a political question.

If it be considered that the matter be not wholly within the legislative discretion of congress, it is at least true that any declaration by congress upon a

question of public policy, or construing the constitution in the light of such question of public policy, is entitled to great weight. *The Genesee Chief*, 12 How. 443; *Cooley vs. Board of Port Wardens*, 12 How. 299; *West River Bridge Co. vs. Dix*, 6 How. 507; *Briscoe vs. Bank of Ky.*, 11 Pet. 257; *McCulloch vs. Maryland*, 4 Wheat. 316.

If the judgment of congress be of advisory force only, it is nevertheless true that there are sound considerations of public policy supporting the determination it has in fact made. We pointed out in an opening portion of this brief the following matters:

1. While the federal government is interested in shipping and transportation of commerce by water, the states are likewise interested in the protection of their resident workers against industrial injuries.

2. The burden of poverty resulting from industrial injuries falls wholly upon the state, not upon the federal government. It is a local burden purely.

3. A port worker is entitled to the same protection for himself and family as that given by the municipal law to other workers. The employer is entitled to a modern law suitable to his interests, particularly one giving limited recovery, simple and inexpensive procedure and adequate insurance as a workmen's compensation act, now supplied by the states, for their other industries.

4. Application of a federal act to injuries sustained by shore workers upon vessels is impracticable as the water line is not a proper dividing line between

maritime and local law. The service rendered is the natural unit of jurisdiction, not the locality of the injury.

**THE BURDEN OF A STATE COMPENSATION ACT IS NO MORE ONEROUS THAN THAT IMPOSED BY THE LAWS PREVIOUSLY APPLICABLE.**

The majority of the court in opinions in the *Jensen* and *Knickerbocker* cases stated that the New York Workmen's Compensation Act would impose upon interstate and foreign shipping a novel and onerous burden. We respectfully submit that the further acquaintance of this court with workmen's compensation matters in cases coming before them, subsequent to the two mentioned, should disclose to the court that this was a misapprehension, the burden, in reality, at least under the act of June 10, 1922, being no greater than that imposed by the common law.

State workmen's compensation acts are enforced by ordinary proceeding *in personam* of the same general nature as that employed in courts. The procedure is less burdensome than that employed in ordinary litigation because of the quickness and inexpensiveness of trial before industrial accident boards and commissions. The proceeding culminates in a money judgment like that of any court enforceable by ordinary process *in personam*. It is true that awards of workmen's compensation benefits are usually for weekly sums instead of in a cash payment, but workmen's compensation acts invariably

contain provisions, similar to Sec. 28 of the California Act, providing for commutation of weekly payments to a lump sum wherever convenient to the parties requiring this action. There is, therefore, nothing in the provisions of such acts defining the liability, which is any more burdensome than an action and decree in the admiralty courts or an action at law for damages in the state courts under the "saving clause."

The court in the earlier cases referred to a collateral provision common to many compensation acts requiring the employer to secure the payment of compensation to his injured workmen by either taking out workmen's compensation insurance in an approved company or depositing securities with the state. Certain penalties are provided if neither course be taken. This is a collateral provision not involving the validity of the main act. If void, it may be so declared in the proper case arising on appeal from imposition of such penalties without affecting the question here involved.

To say the least, such provision for giving security for the meeting of obligations is one which a state may reasonably impose. It is no hardship to a maritime employer to require him to protect himself by insurance against liability. It is a hardship to his employees and the state if he do business within the state without giving such protection or proof of financial responsibility.

We again remind the court that the act of June 10, 1922, by eliminating masters and members of crews of vessels, almost wholly eliminates direct proceedings against foreign vessels. Defendants in claims for workmen's compensation benefits will be almost wholly local employers or firms permanently engaged in business in the home port.

**D. THE VALIDITY OF THE ACT IS UPHELD BY CASES IN WHICH THIS COURT HAS SUSTAINED THE APPLICATION OF OTHER STATE STATUTES TO MARITIME MATTERS.**

The application of a local rule to maritime and equivalent matters has been sustained by this court in

(1) Application of state death statutes, *American Steamboat Co. vs. Chace*, 16 Wall. 522; *Sherlock vs. Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.

(2) The creation by state statutes of maritime liens upon vessels in their home ports, *The Lottawanna*, 21 Wall. 558; *Peyroux vs. Howard*, 7 Pet. 324; *The J. E. Rumbell*, 148 U. S. 1.

(3) The regulation of harbor pilotage by state statutes, *Ex parte McNiel*, 13 Wall. 236; *Anderson vs. Pacific Coast S. S. Co.*, 225 U. S. 187.

(4) State statutes regulating wharfage service, *Ouachita Packet Co. vs. Aiken*, 121 U. S. 444.

(5) State quarantine laws, *Morgan Steamship Co. vs. Louisiana Bd. of Health*, 118 U. S. 455.



(6) Regulation of interstate ferries, *Port Richmond Ferry vs. Hudson Co.*, 234 U. S. 317.

(7) State prohibitory acts interfering with interstate commerce in alcoholic liquor. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311.

(8) Regulation of injuries sustained in the movement of interstate and foreign commerce by rail. Second *Employers' Liability* cases, 223 U. S. 1.

These situations are all comparable to the regulation of injuries sustained by port and harbor employees in local maritime service by state workmen's compensation acts. Uniformity of federal legislation is of no greater importance in the latter case than in the cases cited as the interference with interstate and foreign commerce is about equal in all and the interest of the states in the protection of their own people and local interests is also equal.

**E. THE VALIDITY OF THE ACT IS SUSTAINED BY DECISIONS OF THIS COURT UPHOLDING THE VALIDITY OF THE PILOTAGE ACTS, WILSON ACT AND WEBB-KENYON ACT.**

The substance of this contention has heretofore been made in other connections and it is not necessary to do more here than to state the point. In the pilotage acts, congress provided in 1794 that the regulation of pilots conducting interstate and foreign vessels in and out of the ports and harbors of the United States should continue to be regulated by state laws. The circumstances under which pilots

are employed, regulation of their duties and payment for their services, is more closely connected with commerce and navigation by water than regulation of injuries sustained by port and harbor workers. The pilotage acts have been held valid by this court in many cases including *Cooley vs. Board of Port Wardens*, 12 How. 299; *Hobart vs. Drogan*, 10 Pet. 108, and *Ex parte McNiel*, 13 Wall. 236.

The Wilson Act permitted the states to interfere with the movement of certain interstate commodities before the goods have become mingled with the general body of goods in the state. This identical situation was one which this court in *Leisy vs. Hardin*, 135 U. S. 100, had previously held to be a matter national in scope, forbidding regulation by the states in the silence of congress. Interference with the movement itself of interstate commodities is far more directly a matter of national concern than the regulation of rights of persons employed in such commerce arising out of injuries sustained in the course of their work. The validity of this act was upheld in *In re Rahrer*, 140 U. S. 545; *Rhodes vs. Iowa*, 170 U. S. 412, and *Vance vs. W. A. Vandercook Co.*, 170 U. S. 438.

The Webb-Kenyon Act went further and divested intoxicating liquors of all interstate character, so that states having prohibitory laws could wholly stop interstate commerce in such liquors. It was held constitutional in *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311.

We respectfully submit that there is no difference in principle between the three statutes mentioned and the act now before the court.

**F. THE VALIDITY OF THE ACT IS SUSTAINED BY REFERENCE TO PARALLEL SITUATIONS ARISING UNDER THE COMMERCE CLAUSE.**

The purpose of the grant of jurisdiction of admiralty and maritime causes to the federal government was to secure to the congress power to make such uniform federal regulation of commerce by water as it may see fit to exercise. Ships are of no value to the law as such but only as instrumentalities for the movement of commerce by water. This court recognized in the *Jensen* case that the expedition of commerce was the root of the entire question. We quote:

“And plainly we think no such legislation (state) is valid if it \* \* \* interferes with the proper harmony and uniformity of that law *in its international and interstate relations.*”

“The necessary consequence would be destruction of the very uniformity with respect to maritime matters which the constitution shall design to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to *commerce* \* \* \*.” (Italics ours.)

*Southern Pacific Co. vs. Jensen*, 244 U. S. 205.

It is also well established that the power in congress to regulate commerce includes the power to

regulate commerce by water and navigation. Commerce includes navigation.

*Henderson vs. Mayor of New York*, 92 U. S. 259;

*Lord vs. S. S. Co.*, 102 U. S. 541;

*Gibbons vs. Ogden*, 9 Wheat. 1, 190;

*S. S. Co. vs. Joliffe*, 2 Wall. 450;

*Gilman vs. Philadelphia*, 3 Wall. 713, 724.

Without repeating what has been said before, it is apparent that parallel situations relative to interference by the states with interstate commerce by land constitute authority in the present case.

As pointed out, the regulation of personal injuries sustained by persons employed in interstate commerce is within the state jurisdiction until congress acts. *Second Employers' Liability cases*, 223 U. S. 1.

The states are not precluded by the possibility of interference with interstate and foreign commerce from enacting legislation for the health, safety and general welfare of their citizens, though it may incidentally affect such commerce, unless their legislation conflicts with an act of congress. *Robbins vs. Shelby County Taxing District*, *supra*; *Sherlock vs. Alling*, 93 U. S. 99. The present case is within these holdings.

**G. THE ACT IS VALID AS TO DEATH CASES, OF WHICH  
THE PRESENT IS ONE, INDEPENDENTLY OF ALL  
OTHER CONSIDERATIONS.**

The law maritime provides no remedy for injuries resulting in death. *American Steamboat Co. vs. Chace*, 16 Wall. 522; *The Harrisburg*, 119 U. S. 199; *The Corsair*, 145 U. S. 335.

Where the admiralty law contains no provision upon the subject, there is nothing with which state legislation can conflict and state statutes upon the subject are valid, regardless of the maritime nature of the situation. *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263; *American Steamboat Co. vs. Chace*, 16 Wall. 522.

The case at bar is one of fatal injury. The act of congress should be held constitutional in this case, regardless of all other considerations.

### CONCLUSION.

We respectfully submit that the act of June 10, 1922, should be held constitutional for the following reasons:

(1) Congress has power to retract the admiralty and maritime jurisdiction to permit the states to care for injuries sustained by their citizens and residents in port and harbor maritime work.

(2) While the federal government is interested in shipping, the states are also interested in the protection of their local workers and the protection of the essential interests of the states against harm through disabling injuries sustained by their residents in the course of local employments. Congress may in its discretion recognize and balance the interests of the state and national government and declare that the necessity for uniformity of federal law does not extend to the situation here involved.

(3) The basis of the exclusion of state workmen's compensation acts in the *Jensen* and *Knickerbocker* cases must be in one or more of the following considerations, all of which are overcome by the new act.

(a) That the silence of congress, in view of the national interests involved, should be construed as a prohibition upon the states. Congress has now spoken.

(b) That the original "saving clause" and the 1917 amendments do not include the creation of substantive rights or authorize their creation by the

states. Congress has now expressly authorized their creation.

(c) That congress can not allow the substantive maritime law, as part of the law of the United States, to continue to occupy the field and at the same time authorize the states to provide an optional remedy conflicting with it. Congress has now made the state remedy exclusive where applicable, so that all possibility of conflict is removed.

(d) That the grant to the federal government of jurisdiction in maritime matters was made for the purpose of securing uniformity of regulations as far as practicable by national law, and congress can not disturb that uniformity. Answer (1) such uniformity is not practicable in this class of cases. (2) The power to determine its practicability in a particular case is a legislative and not a judicial function. (3) The constitution does not make uniformity mandatory; it instead gives congress full authority to secure it wherever in the judgment of congress it should be secured. The national interests are sufficiently protected by leaving the power to congress to be exercised in its discretion. The contention of defendant in error would call upon this court to supervise the exercise of discretion by congress upon question of fact and policy.

## II.

**THE GENERAL MARITIME LAW DOES NOT FORBID  
APPLICATION OF A STATE WORKMEN'S COMPEN-  
SATION ACT TO MARITIME OR SEMI-MARITIME  
INJURIOUS WHERE SUCH STATE STATUTE IS AN  
ELECTIVE ACT.**

Workmen's compensation acts are of two general types, compulsory and elective. A compulsory act is one in which the state by its legislative power prescribes unconditionally the measure of liability of employers within the terms of the act. Of such type is the Workmen's Compensation Act of New York which forms the basis of this court's decision in *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, sustained against general objections by this court in *New York Central R. Co. vs. White*, 243 U. S. 188. Elective workmen's compensation acts, on the other hand, are such as are made applicable to a particular employment only by the express or implied contract of the employer and his employees, agreeing to adopt the measure of such statute as the measure of their rights and liabilities. In the event such act is not adopted by the parties in each case, they remain subject to the older law. The validity of such act was sustained by this court in *Hawkins vs. Bleakley*, 243 U. S. 210. The contractual nature of such act is well explained in *Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, and *Berry vs. Donovan & Sons* (Me. 1921), 115 Atl. 250. The theory of liability



under an elective statute is that the obligation is contractual, the parties having adopted as an implied portion of the terms of their contract of hire the statute of the state and the suit for workmen's compensation benefits being a suit upon contract.

The Workmen's Compensation Act of California here involved is both compulsory and elective. It is compulsory as to industrial occupations generally, as defined therein, and elective as to farm labor, household domestic service, casual employment, and all other employments not otherwise within its provisions (sections 7, 8, 70). The mode of election is prescribed in section 70, reprinted in the margin. One of the modes of election provided is the act of

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SEC. 70. (a) Any employer, having in his employment any employee not included within the term "employee" as defined by section eight of this act or not entitled to compensation under this act, and any such employee, may, by their joint election, elect to come under the compensation provisions of this act in the manner hereinafter provided.

(b) Such election on the part of the employer shall be made by filing with the commission a written statement to the effect that he accepts the compensation provisions of this act, which, when filed, shall operate, within the meaning of section six of this act, to subject him to the compensation provisions thereof, and of all acts amendatory thereof, for the term of one year from the date of filing, and thereafter without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or succeeding year, file in the office of the commission a notice in writing that he withdraws his election. Such acceptance shall be held to include employees whose employment is both casual and not in the course of the trade, business, profession or occupation of the employer, unless expressly excluded therefrom. *In case any employer is insured against liability for compensation under this act, he shall be deemed to have so elected during the period that such policy shall remain in force, without filing such written notice with the commission, as to all classes of employees covered by such policy of insurance, anything in this act to the contrary notwithstanding.*

(c) Any employee in the service of any employer who has made an election in either of the modes above prescribed, shall be deemed to have accepted, and shall, within the meaning of section six of this act, be subject to the compensation provisions of this act, and of any act amendatory thereof, if, at the time of the injury for which liability is claimed:

(1) The employer charged with such liability is subject to the compensation provisions of this act, whether the employee has actual notice thereof or not; and

the employer in taking out a policy of workmen's compensation insurance.

In the present case defendant in error James Rolph Company applied for and received from defendant in error General Accident, Fire and Life Insurance Company a policy of workmen's compensation covering all its operations. The Supreme Court of California has impliedly determined that such act would constitute the election prescribed by the statute except for the bar of the federal law maritime. The court said in this connection, in *Zurich General Accident and Liability Insurance Company vs. National Accident Commission*, 218 Pac. 563, this holding being incorporated by reference in the decision in the case at bar and the insurance policies in the two cases being identical in scope:

“Assuming that the act of taking out such a policy of insurance ordinarily may have the effect

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(2) Such employee shall not, at the time of entering into the employment, have given to his employer notice in writing that he elects not to be subject to the compensation provisions of this act; or, in the event that such employment was entered into in advance of the election by the employer, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices, shall have remained in the service of such employer for five days after the employer has filed his election, in which case, the time at which the employee becomes subject to said compensation provisions shall be deemed to be at the beginning of said period.

(d) The state, and all political or other subdivisions thereof, as defined in section seven, and all state institutions, shall be conclusively presumed to have elected to come within the provisions of this act as to all employments otherwise excluded from this act.

(e) All written acceptances filed by employers with the commission prior to the taking effect of this act, accepting the provisions of the workmen's compensation, insurance and safety act, chapter one hundred seventy-six, statutes of 1913, and all acts amendatory thereof, shall, unless written notice be given to the contrary by said employer within sixty days after the taking effect of this act, be deemed acceptances of the provisions of this act, and all acts amendatory thereof, in accordance with the provisions of this section. (*Italics ours.*)

of bringing the employer under the workmen's compensation provisions of this act, as provided, it can not of itself confer jurisdiction upon the commission, where, as in this case, exclusive jurisdiction of the matter in controversy is vested in the admiralty courts."

It, therefore, appears that the decision below did not turn upon any question of construction or application of the state statute, or of its validity under the state constitution, but that, instead, the decision against petitioners was turned wholly upon the federal question involved.

We respectfully submit that the lower court erred in its determination of this federal question for the following reasons:

(1) The maritime law does not prohibit the parties voluntarily adopting by election the provisions of a state workmen's compensation act as part of the terms of their contract of hire.

(2) The obligation being contractual and the contract of employment maritime, the proceeding is within the jurisdiction of the state courts under the original saving clause contained in sections 24 and 256 of the Judicial Code as it stood prior to the amendments of November 6, 1917, and June 10, 1922, as well as under the later amendments.

*A. Maritime law does not prohibit such election.*

Primarily a distinction is to be noted, based upon *Erie Railroad vs. Winfield*, 244 U. S. 170. This court there held invalid as to railroad employees

engaged in interstate commerce a provision of the New York Workmen's Compensation Act to the effect that employers and employees should be deemed to have elected to come within the workmen's compensation act if they did not within a certain time file a notice dissenting from said act. This was upon the ground that such provision was really a disguised compulsory application of the law, and that the state could not force the parties to elect to stay out. In the present case the election is not forced by a presumption in the statute, but is made by the affirmative and voluntary act of the employer in procuring insurance under the Workmen's Compensation Act, a wholly different matter.

We believe the decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469, fully establishes the validity of such election. In the *Rohde* case the parties had accepted the Workmen's Compensation Act of Oregon as an elective act by their affirmative and voluntary act, and as the writer reads the opinion in that case the validity of such acceptance was one of the two independent grounds upon which the decision of this court was expressly based.

The validity of such election has also been sustained in the following decisions of state courts of last resort.

*West vs. Kozar* (Ore. 1922), 206 Pac. 542;  
*Berry vs. Donovan & Sons* (Me. 1921), 115 Atl.  
250;

*Bockhop vs. Phoenix Transit Co.* (N. J. 1922),  
117 Atl. 624;  
*Lumbermen's Reciprocal Association vs. Adcock*  
(Tex. 1922), 244 S. W. 645;  
*Southern Surety Co. vs. Stubbs* (Tex.), 199  
S. W. 343;  
*Gillard's case* (Mass.), 138 N. E. 384.

None of these decisions was discussed by the Supreme Court of California, though cited in our briefs, and no case is cited by that court in which the validity of such voluntary election has been doubted.

Approaching the matter in a more general aspect, the parties to a maritime contract may specify what law they desire to have read into its terms and govern their rights and liabilities under it.

*Union Fish Co. vs. Erickson*, 248 U. S. 308, 313;  
63 L. Ed. 261;  
*Watts vs. Camors*, 115 U. S. 353, 362; 29 L. Ed.  
406;  
*Pritchard vs. Norton*, 106 U. S. 124, 136; 27 L.  
Ed. 104;  
*Wayman vs. Southard*, 10 Wheat. 1, 48; 6 L. Ed.  
252, 264.

In the last case cited the court says, through Mr. Chief Justice Marshall:

“As construed by the court, this section is the recognition of the principle of universal law, the principle that in every forum a contract is governed by the law with a view to which it was made.”

It is stated in *Corpus Juris*, Vol. 13, page 251 :

“Where the parties have expressly provided that the contract shall be governed by the law of a particular country, this intention will as a rule be carried out by the courts, and a party is bound by his choice. Parties may substitute the laws of another place or country, than that where the contract is entered into, both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms. This is part of the *jus gentium*, and is enforced *ex comitate*, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of the contract.”

In *West vs. Kozar*, *supra*, the Supreme Court of Oregon had before it the application of the Oregon Workmen's Compensation Act, a purely elective statute, to the whole field of maritime employments, five particular classes of maritime employments being involved in the case. The court upheld the application of the state compensation act and the jurisdiction of the Oregon commission upon all the points urged by us in the present case, the court saying in part :

“We do not understand the court as holding that an employer and an employee may not, as between themselves, contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident, and preclude the necessity of litigation in

the federal courts, which is the case here presented. The method is a beneficent one, insuring to every employee a certain remedy and fair compensation instead of difficult litigation, a doubtful remedy and in many cases resulting in no compensation."

\* \* \* \* \*

"It can not be shown that, in the instances brought to our notice by the present appeal, the allowance of the stipulated award will in any manner 'work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.'

"It is not the policy of the law, international or otherwise, to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out, and, in view of the decision last quoted, this ought to terminate the present controversy in favor of the petitioners.

"But the petitioners have a concrete case from the same court, the opinion being rendered by the same eminent justices who decided the cases of *Knickerbocker Ice Co. vs. Stewart and Western Fuel Co. vs. Garcia*, *supra*. We refer to the case of *Grant Smith-Porter Ship Co. vs. Rohde*, 256 U. S. — (257 U. S. 469), 42 Sup. Ct. 157, 66 L. Ed.—, United States Supreme Court case No. 35, decided January 3, 1922. The case briefly was this: \* \* \*

The court here states the facts of the *Rohde* case and then goes on to say:

“It will be observed that the last paragraph in the opinion practically concedes, that but for the fact that the parties had elected to come under the provisions of the compensation act, the jurisdiction in admiralty would have existed, which is what the petitioners contend here. It may also be noted that, while the United States District Court, in its second opinion, held that the libelant had an election of remedies, the Supreme Court of the United States held that his remedy in admiralty was abrogated by his consent to come under the terms of the state compensation act, which is going further than is required in the matters here under consideration, where all parties are seeking their remedy under the compensation act and have brought this proceeding to avoid the delay, expense, and uncertainty of proceeding in admiralty. While it can not be said that the circumstances in the case last above cited correspond in every detail to the cases at bar, they are nearly enough identical to illustrate the general principle, which is:

“ ‘That as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified as supplemented by state statutes.’

“Here, as in the case last cited, there is no question of extraterritorial jurisdiction of the state involved. The contracts for services were made within the state, between employers and em-



ployees doing business within the state and at or upon waters lying within the boundaries of the state.

“Counsel for defendant have failed to point out any possible contingency under which an application of the compensation law might prejudicially interfere with the application of any of the rules of maritime law, which are so essential to the commerce of the country; and it is not believed that it is possible for such a contingency to arise. On the contrary, the encouragement of such agreements between employer and employee as is contemplated by our compensation laws, has a tendency to prevent litigation and, in instances like the present, to relieve the already overburdened federal courts of vexatious litigation.

“Many cases have been cited bearing more or less remotely upon the questions here discussed, but, while they have not been overlooked, we prefer to place our decision upon the latest utterances of the United States Supreme Court, in cases having a direct bearing upon the present controversy. If we correctly interpret these later opinions, we must find that the law is with the petitioners.”

In the *Rohde* case, Rohde was held to have properly brought his suit in the State Industrial Commission after the decision of this court, except as to limitations (*Rohde vs. State Industrial Accident Commission* (1923), 217 Pac. 627.

B. *Recovery being upon contract in this class of cases, the case is within the “saving clause” con-*

tained in sections 24 and 256, Judicial Code, as originally enacted.

In *Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, the parties elected to come within the Connecticut Workmen's Compensation Act in the manner provided by said act. The obligation of the employer to furnish workmen's compensation benefits is treated as an obligation arising upon contract, the terms of the workmen's compensation act being an implied portion of the terms of the contract of hire. The court said:

"The contract in question (*i. e.*, of employment) may be assumed to be a maritime one. That would give the admiralty court the right to take jurisdiction over it. It could not take from our courts jurisdiction over a contract made in Connecticut by citizens of Connecticut, nor prevent its enforcement wherever it is operative by the procedure of the statute of its origin. This contract is to be interpreted and enforced by the application of the same principles accorded any contract. \* \* \* Plainly, this proceeding is a personal action, and not one *in rem*. The admiralty court has not exclusive jurisdiction. *Knapp, Stout and Co. vs. McCaffrey*, 177 U. S. 638, 643; *Schoonmaker vs. Gilmore*, 102 U. S. 118; *Leon vs. Galceran*, 78 U. S. (11 Wall.) 185; *The Belfast*, 74 U. S. (7 Wall.) 624; *The Hine vs. Trevor*, 71 U. S. (4 Wall.) 555, 567, 568; *Manchester vs. Massachusetts*, 139 U. S. 240."

We therefore respectfully submit that nothing in the law maritime prevents the parties to a maritime contract of employment from voluntarily electing to come within the provisions of the state workmen's compensation act, including the enforcing agency provided by the statute of their adoption.

Respectfully submitted.

WARREN H. PILLSBURY,  
*Counsel for Plaintiffs in Error.*

JAN 7 1924  
WM. R. STANSBURY  
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No. 684

In the Supreme Court  
OF THE  
United States 12

INDUSTRIAL ACCIDENT COMMISSION OF THE  
STATE OF CALIFORNIA, et al.,

*Plaintiffs in Error,*

vs.

JAMES ROLPH COMPANY (a corporation),  
et al.,

*Defendants in Error.*

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

L. A. REDMAN,  
JEWEL ALEXANDER,  
W. C. BACON,

*Attorneys for Defendants in Error.*

*H. Bowdoin Craigell,  
Chas. B. Tebbe,  
of Counsel.*



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*Defendants in Error.*

## BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

### Statement of the Case.

The question involved in this case is the constitutionality of the Act of Congress of June 10, 1922, which attempted to deprive a class of maritime workers of rights conferred upon them by the Maritime Law and to substitute therefor the benefits of state compensation laws administered exclusively by state industrial commissions.

The Supreme Court of California, following the decisions (hereinafter cited) of a number of both state and federal tribunals, declared said act to be unconstitutional.



The California court held that the Amendment of 1922 was more objectionable than the Amendment of 1917, which this court in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, held unconstitutional. The law as amended, said the court, was

“more repugnant than it was before the last amendments, for the reason that it is discriminatory and attempts to deprive the Federal courts of jurisdiction over certain admiralty and maritime cases while vesting them with jurisdiction in others.”

*James Rolph Company, et al. v. Industrial Accident Com., etc., et al.*, 66 Cal. Dec. 575;  
..... Pac.....

Counsel for plaintiffs in error has filed an elaborate brief in which he asks this court to reconsider a number of its own decisions rendered after prolonged, careful and exhaustive consideration of the questions therein determined, because, as we understand him, these decisions were concurred in by only a “bare majority” of the court. Nevertheless, these adjudications are the decisions *of the court*, and we do not understand that merely because some of the members of the court at the time the cases were decided entertained views at variance with the views of the court, these decisions are any less authoritative and binding. It has not heretofore been considered that every litigant dissatisfied with the reasoning of a court of last resort may require it to reconsider its well considered and authoritative rulings. The rule of *stare decisis* of course controls with respect to the matters here involved. And for this

reason we shall decline to follow counsel in his many ramifications pursued with a view to undermining the decisions of this court by "going behind" them, which decisions the Supreme Court of California, and other state and federal tribunals have regarded as correctly declaring the law and as binding upon them. And in this connection it is to be observed that the Supreme Court of California, prior to the decision of this court in *Knickerbocker Ice Co. v. Stewart*, *supra*, reached the same conclusion arrived at by this court. See

*Sudden, et al., v. Industrial etc. Commission*,  
182 Cal. 437; 188 Pac. 803.

But counsel, undeterred by these considerations, again advances arguments repeatedly held by these authoritative adjudications to be untenable, and asks that his own views and opinions be accepted as correct and convincing expositions of the law. He may be right, but we prefer to take the law as declared by this court, and accordingly shall pass over without comment such parts of counsel's argument as do not relate to the question of the validity of the Amendment of 1922, regarding it as a settled proposition that the Act of 1917, as ruled by this court and the Supreme Court of California, is invalid.

## Argument.

### I.

THE ACT AS AMENDED IN 1922 IS MORE OBJECTIONABLE  
THAN THE ACT OF 1917.

The Supreme Court of California so held, pointing out that the law as amended was

“more repugnant than it was before the last amendments, for the reason that it is discriminatory and attempts to deprive the Federal courts of jurisdiction over certain admiralty and maritime cases while vesting them with jurisdiction in others.”

Counsel argues that the deceased, a stevedore, was not engaged in a maritime occupation within the meaning of the Constitution. But this question was considered and decided by this court in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, following the case of *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, in which latter case *certiorari* was issued because of a divergence of views between the Courts of Appeals of the Second and Ninth Circuit, and in which case, after full consideration and exhaustive arguments and having in mind the conflicting views entertained by the lower tribunals, this court held that stevedoring was a maritime occupation and that stevedores injured on vessels in navigable waters were entitled to maritime rights and remedies as fully as members of a vessel's crew; that the work which stevedores perform is essentially maritime in its nature, though now performed by a special class of workers. We do not apprehend that

this court will, the circumstances considered, at this late date be disposed to reinvestigate the subject and to reconsider the arguments made *pro* and *con* in the *Imbrovek* case. We take it that the views expressed so clearly and forcibly by Mr. Justice Hughes in that case, and concurred in by all of the other justices of this court, will be regarded as final and conclusive so far as the case at bar is concerned. This being postulated it necessarily follows that the Amendment of 1922 is invalid because, as the Supreme Court of California pointed out, it is more objectionable than the earlier amendment. The new amendment selects a particular class of maritime workers, or rather it leaves to the courts to discover just what maritime workers remain after deduction of the "master and crew". Upon this vaguely defined class of maritime workers Congress sought to confer certain "benefits" varying with the laws of the different states and to deprive this class of clearly defined and uniform rights and remedies conferred on them by the maritime law. No reason is conceivable why a *sailor* (as often happens) engaged in loading or unloading a vessel should be deprived of so-called "compensation", if other workers *doing precisely the same work* are entitled to receive such "compensation". If the act had provided that *every maritime worker injured while engaged in loading or unloading* should be entitled to compensation, the case would be different. But to deprive a member of the "*crew*" of "compensation" merely because part of *his* duties happened to be

performed by a class of maritime workers who are not technically "seamen", is certainly a manifest and grossly unjust discrimination. A "seaman" who performs the *maritime* work of a stevedore is assuredly as much entitled to "compensation" as the stevedore himself. As Mr. Justice Hughes points out, for economic reasons the work formerly done by the sailors themselves is now done by stevedores. But if because of burdens imposed by law upon employers of stevedores ship owners and operators find it more economical under the changed conditions to do their own loading and unloading, they will of course cease to have it done by stevedores, who will then have to hunt new jobs. The bestowal of so-called "compensation" would be poor *compensation* for loss of their occupations.

The trouble with most of these so-called "humanitarian" measures, fathered by popularity-seeking politicians, is that they fail to take into account *natural economic laws*. The *reductio ad absurdum* of this propensity, is that each of us shall be favored with special privileges at the expense of all of us. The folly of such measures has been time and again exposed by disinterested and competent students of such problems. It is of course quite easy to provide "benefits" for the unfortunate and to give such enactments the color of delayed recognition of *just claims*; provided, of course, that no obligation is incurred by those who pass these bills to *pay* them. It is to be regretted that our legislators should be disposed so easily to depart from sound principles

of right and justice, upheld by our Constitution, leaving charity to be administered by private benevolence. Instead they are constantly seeking to develop new avenues for bestowal of unearned "benefits" upon large and politically influential factors of the body politic.

On the other hand, it is a matter of comfort and congratulation that this court has always been a staunch bulwark against these attempts to unsettle the fundamental principles upon which our government rests and true progress depends. *Ad captandum* legislation enacted by demagogues for political reasons, violative of constitutional guaranties, have invariably been declared by this court to be nullities.

But despite this fact, scheming and selfish politicians continue their attempts to delude the public by proposing the bestowal of "benefits" upon particular classes at heavy cost to the tax-paying public, and incidentally to provide lucrative positions for their political retainers. Unfortunately many of the electorate are incompetent to detect the fallacies concealed in such proposals. Their attitude of mind recalls the case of a certain princess who expressed surprise that poverty should exist while it was so easy for the government to provide money for everybody. And, as in the case at bar, attempts are made to influence the courts by the suggesting that each new so-called "humanitarian" measure is in line with "progressive" and enlightened public policy.

Upon the plea that unless something is done *by public instrumentality* for the unfortunate, negligent or incompetent, they will become "charges" on the state, political bureaus are being multiplied, their aim being the repeal of the inexorable laws of nature which rigidly attach consequences to conduct; trying, as Herbert Spencer pointed out, "to supersede with their clumsy mechanisms the great laws of existence." The next move in line with this socialistic drift will be the abolition of punishment of crime on the theory that criminals are the "victims of society" and that "society" should see to it that crime be not committed lest the criminals become a "charge" on it.

This "humanitarian" tendency is absolutely opposed to the natural and constitutional principle that laws must be just and that charitable considerations are entirely without their scope. Justice and charity occupy different spheres and attempts to unite them in one results in the ruin of both.

Counsel for plaintiff in error has not cited a single case which sustains the validity of the 1922 Amendment. All of the courts which have had occasion to consider the question have reached the same conclusion as the Supreme Court of California. See

*State v. W. C. Dawson & Co.*, 211 Pac. 724  
(Wash.):

*State v. W. C. Dawson & Co.*, 212 Pac. 1059  
(Wash.):

*Farrell v. Waterman S. S. Co.*, 286 Fed. 284;  
*The Canadian Farmer*, 290 Fed. 601;  
*Farrell v. Waterman S. S. Co.*, 291 Fed. 604.

The fact that this is a death case is immaterial. The *Jensen* case, *supra*, was also a death case and the same point was urged on behalf of the claimant in that case.

It is true that state statutes conferring a right of action for death have been recognized and enforced in admiralty, but certainly had such statutes provided that only *state courts* could award such relief in *admiralty cases*, such provision would have been held invalid. Conceding a right in admiralty in a death case, *the Federal courts may not be deprived of jurisdiction to award the relief*. Now this is precisely what is attempted to be done by the Amendment of 1922. Jurisdiction is removed from the Federal courts and conferred upon the State courts and commissions.

Furthermore, it cannot be presumed that Congress would have legislated for death cases only. It would not have provided for relief in case of *death*, but not in case of *injury*. The statute must be considered *as a whole* because it deals with a single comprehensive scheme. As a whole it is invalid and hence every part of it must be regarded as invalid; the subject matter, meaning and purpose of the entire act are such that it cannot be presumed that



Congress would have provided a remedy for death and not for injury. See

36 *Cyc.* 977;

*Hill v. Wallace*, 259 U. S. 44; 66 L. Ed. 822;

*U. S. v. Reese*, 92 U. S. 214; 23 L. Ed. 563;

*Trade-Mark cases*, 100 U. S. 82; 25 L. Ed. 550;

*Employers' Liability cases*, 207 U. S. 463; 52 L. Ed. 297;

*Butts v. M. & M. Transp. Co.*, 230 U. S. 126; 57 L. Ed. 1422;

*James v. Bowman*, 190 U. S. 127; 47 L. Ed. 979.

In the *Trade-Mark cases*, *supra*, the court said (p. 99):

"If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. *Cooley, Const. Lim.*, 178, 179; *Com. v. Hitchings*, 5 Gray 482."

Repeatedly throughout his brief counsel cites the case of *Clark Distillery Co. v. Western Maryland Railroad Co.*, 242 U. S. 311, as sustaining his position. But unfortunately for counsel this court, in *Knickerbocker Ice Co. v. Stewart*, *supra*, and the Supreme Court of California in the *Sudden &*

*Christensen case, supra*, have both held this contention to be unsound. However, he pays no more attention to the authoritative and responsible adjudications of these tribunals than he would to the utterances of a soap-box orator.

Counsel says that,

“In the *Knickerbocker Ice Company case*, this court suggests that the 1917 Act of Congress involved a delegation of legislative power to the states. The Court was apparently here speaking of a statute in which the maritime law was stated to have been left in the field but claimants were authorized to elect between a claim under the state workmen’s compensation act or the maritime law. This indirectly gave to the states the power to supersede applicable rules of the maritime law by their own statutes. This situation does not exist in the present case. By the 1922 Act, State workmen’s compensation acts are made exclusive where applicable. In states having such acts there is no maritime law to conflict with the state powers. Where the state can make its rules applicable to maritime matters it does so under its own police power and not through the grant of any authority from Congress to legislate.”

So much the worse for the 1922 amendments, for they *absolutely* deprive maritime workers of admiralty rights and remedies and also deprive the Federal courts of all jurisdiction in the premises.

Counsel also says that,

“It is well established by the authorities that the inferior Federal Courts can exercise no jurisdiction not conferred upon them by specific acts of Congress and that Congress is not

compelled to confer the entire judicial power of the United States upon the Courts created by it. The jurisdiction of the inferior Federal Courts is statutory only.

The 'saving clause' contained in Section 24 and 256 Judicial Code is complete proof of this. By it, Congress has given to the state courts concurrent jurisdiction over all maritime matters against proceedings *in rem*, and brig cases. If the Federal constitution confers *exclusive* jurisdiction upon the Federal Courts in admiralty matters, the State courts have been exercising an illegal jurisdiction for 134 years."

The answer to this is of course that the 1922 Amendment not only deprives maritime workers of maritime rights and remedies, but it also deprives the Federal courts of jurisdiction with respect to the substituted rights and remedies attempted to be conferred upon such workers and confers jurisdiction with respect thereto to state tribunals.

Section 2 of Article III of the Constitution of the United States provides that the judicial power of the United States "shall extend to \* \* \* all cases of admiralty and maritime jurisdiction". It is to be noted that the framers of the Constitution have used in that section the word "all". The 1922 amendments would leave to the United States courts jurisdiction in *certain only* of admiralty cases. We submit that Congress is without power to limit that jurisdiction. Within its power to declare and define the maritime law, Congress might be authorized to declare certain claims non-maritime thereby removing them from admiralty jurisdiction but with

such possibility we are not here concerned. In the 1922 amendments Congress has said that with respect to a class of maritime claims the district courts may take jurisdiction if there is no compensation act but not if there be. This we contend is beyond the power of Congress. The "exclusive jurisdiction" of the Federal courts does not, as counsel states, come from the Judiciary Act, but comes from the constitutional provision which gives to the Federal courts jurisdiction over "*all* cases of admiralty and maritime jurisdiction", and this limitation is carried forward into the Judiciary Act of 1789 and the Federal Judicial Code from *the Constitution itself*. See

*Farrell v. Waterman S. S. Co.* 291 Fed. 604, decided July 24, 1923. In this opinion the court elaborates upon its former opinion in the same case, reported in 286 Fed. 284, discusses the derivation of the power of Federal courts over admiralty and maritime matters, and concludes,

"When exclusive jurisdiction is given by the Constitution, the Congress cannot limit or restrict this jurisdiction."

The power given Congress by Article I, Section 8 of the Constitution to legislate with respect to admiralty and maritime matters must be considered in the light of Article III, Section 2, which vests judicial power in the *Federal* courts over "*all* cases of admiralty and maritime jurisdiction." Any congressional enactment which conflicts with this provision is of course a nullity.

The 1917 amendments attempted to give to claimants *in addition* to their *remedies* under the maritime rules and their common law remedies, *rights* under workmen's compensation acts. This was held to be beyond the scope and function of a "saving clause." But the Act of June 10, 1922, goes even further. It attempts to *force* these *rights* under state workmen's compensation acts upon claimants as an *exclusive* remedy, and to *deprive* the Federal courts of the jurisdiction guaranteed to them over admiralty and maritime cases by the constitution and to *confer* that jurisdiction upon state industrial commissions.

Counsel states that Congress may give less than the full jurisdiction authorized by the Constitution or can refrain from conferring jurisdiction in admiralty upon any Federal court, or can withdraw in whole or in part jurisdiction already conferred. Assuming this to be true, still if Congress attempts to *confer* jurisdiction in maritime matters *upon a tribunal other than a Federal court* it has contravened the constitutional provision. The question involved here is not whether Congress can increase or diminish the maritime jurisdiction of district courts, but whether it can give jurisdiction to *other than a Federal tribunal* and the constitutional provision referred to declares that it cannot. The case of *Carr v. S. S. Sorland*, 1 American Maritime cases 158, relied on by plaintiffs in error is not in point. In that case a libel filed in admiralty in the United States District Court, Eastern District of Virginia, was upon exceptions thereto dismissed by the court

upon the ground that the 1922 amendments to Sections 24 and 256 of the Federal Judicial Code exclude the jurisdiction of the District Court in such cases. But, the court adds:

“Whether Congress may, constitutionally, confer jurisdiction on the state courts, \* \* \* is a question which is not in issue in this controversy, and can only be raised by objection to the enforcement of a decree of the State Court or of the Industrial Commission.”

The case, therefore, is not authority upon the issue involved in this case, i. e., whether the enactment of Congress attempting to confer jurisdiction upon the Industrial Accident Commission of California is constitutional.

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## II.

### THERE WAS NO ELECTION ON THE PART OF THE EMPLOYER TO BRING ITS EMPLOYEES UNDER THE CALIFORNIA COMPENSATION ACT.

The Supreme Court of California so held in the case at bar (66 Cal. Dec. 575; ..... Pac. ....), basing its ruling upon a prior decision to the same effect in the case of *Zurich etc. Co. v. Industrial Accident Commission*, 218 Pac. 563.

This ruling, involving the construction and not the validity of a state statute, as to a state matter, is of course conclusive on this court.

*Quong Ham Wah Co. v. I. A. C. of California, et al.*, 255 U. S. 445; 65 L. Ed. 724;

- Erie R. R. Co. v. Hamilton*, 248 U. S. 369,  
371-2; 63 L. Ed. 307;  
*Stadelman v. Miner*, 246 U. S. 544; 62 L.  
Ed. 875;  
*Ireland v. Woods*, 246 U. S. 323, 330; 62 L.  
Ed. 745;  
*Johnson v. N. Y. Life Ins. Co.*, 187 U. S. 491,  
496; 47 L. Ed. 273;  
*Comm. Bank v. Buckingham*, 5 How. 317, 342;  
12 L. Ed. 169.

Nor, aside from this consideration and the reasons given by the Supreme Court of California in the *Zurich Co.* case, *supra*, in support of its judgment, is there any merit whatever in this contention *with respect to the case at bar*. For this reason: The policy of insurance issued in this case expressly protected the employer against liability either under the Compensation Act *or under the maritime law*. The employer desired protection against both contingencies and his insurer issued a policy to him which provides for payment of either compensation or damages as the case may be. A stevedore injured on the dock is entitled to compensation. Hence the employer purchased insurance covering such contingency. He also purchased insurance covering the contingency of liability under the maritime law for injury or death sustained by employees working on vessels in navigable waters. There was no "election" on the part of the employer to bring his employees under the compensation law or any other law. He merely secured protection for him-

self against any liability that any employers' law imposed upon him. Thus the entire foundation is removed from the argument based upon the assumption of an "election" on the part of the employer.

Dated, San Francisco,

December 29, 1923.

Respectfully submitted,

L. A. REDMAN,

JEWEL ALEXANDER,

W. C. BACON,

*Attorneys for Defendants in Error.*

*J. Bowdoin Craig Hill,  
Chas. B. Sebbs  
Of Counsel.*



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IN THE  
**Supreme Court of the United States,**

OCTOBER TERM, 1923.

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\_\_\_\_\_  
No. 684.  
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INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF  
CALIFORNIA AND JOSEPH HAYES, THOMAS HAYES,  
HELEN HAYES AND MARY HAYES, MINORS, BY MARY  
LORDAN, GUARDIAN OF THEIR PERSONS AND ESTATES,

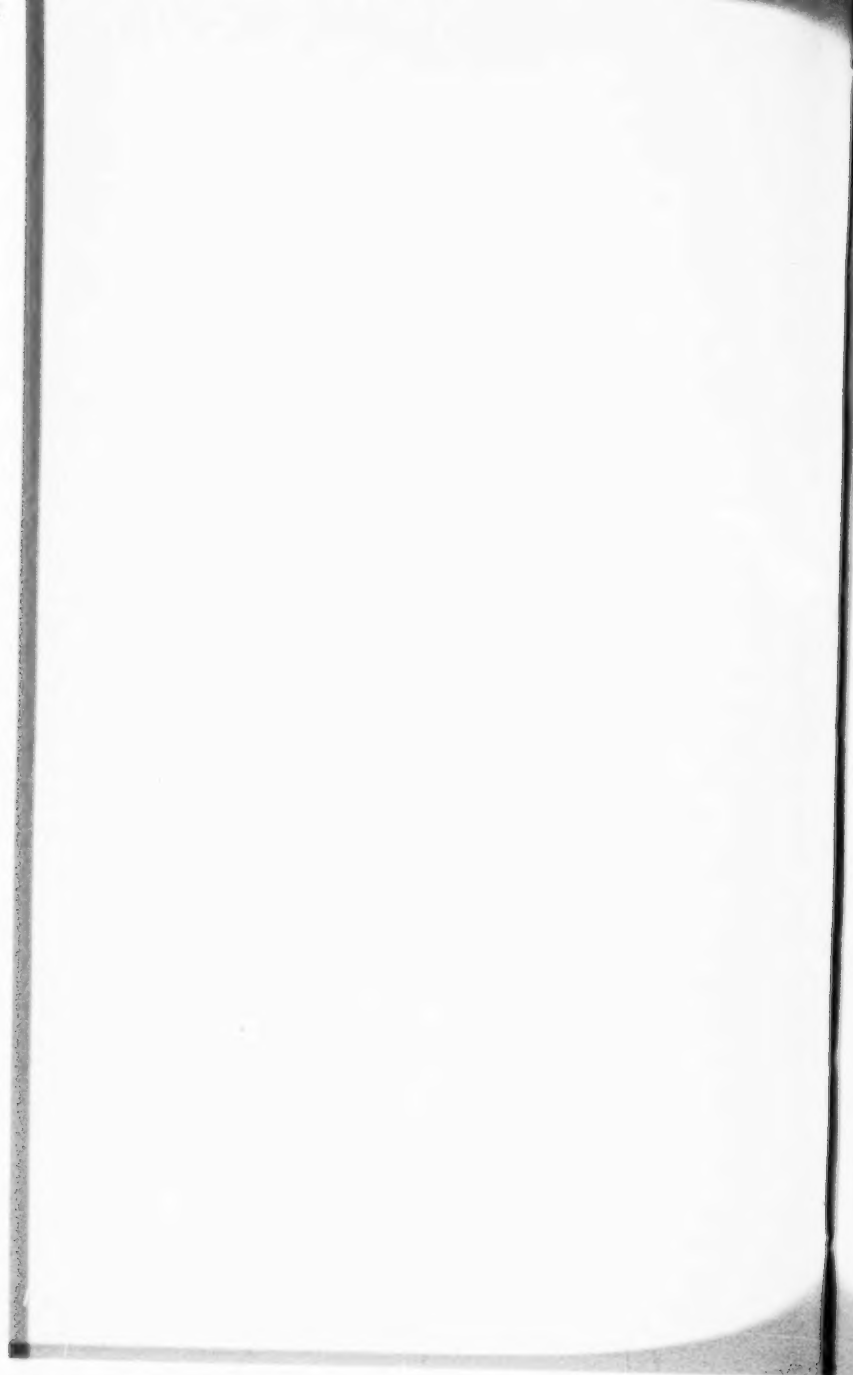
*Plaintiff in Error,*

*vs.*

JAMES ROLPH COMPANY AND GENERAL ACCIDENT, FIRE  
AND LIFE ASSURANCE CORPORATION, LIMITED, A COR-  
PORATION,

*Defendants in Error.*

✓  
BRIEF OF HENRY C. HUNTER, AMICUS CURIAE AND ATTORNEY FOR COUNCIL  
OF AMERICAN SHIPBUILDER'S, INC., AND NEW YORK AND NEW  
JERSEY DRY DOCK ASSOCIATION, AND OF JOSEPH P. CHAM-  
BERLAIN, AMICUS CURIAE AND ATTORNEY FOR LONG-  
SHOREMEN'S UNION OF AMERICA.



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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1923.

No. 684.

INDUSTRIAL ACCIDENT COMMISSION  
OF THE STATE OF CALIFORNIA and  
JOSEPH HAYES, THOMAS HAYES,  
HELEN HAYES and MARY HAYES,  
minors, by MARY LORDAN, guar-  
dian of their persons and estates,  
Plaintiffs in Error,

vs.

JAMES ROLPH COMPANY and GEN-  
ERAL ACCIDENT, FIRE AND LIFE  
ASSURANCE CORPORATION, LIM-  
ITED, a corporation,  
Defendants in Error.

BRIEF OF HENRY C. HUNTER, AMICUS CURIÆ,  
AND ATTORNEY FOR COUNCIL OF AMERICAN  
SHIPBUILDERS, INC., AND NEW YORK AND NEW  
JERSEY DRY DOCK ASSOCIATION, AND OF JOSEPH  
P. CHAMBERLAIN, AMICUS CURIÆ, AND AT-  
TORNEY FOR LONGSHOREMEN'S UNION OF  
AMERICA.

**Statement.**

By leave of Court the undersigned, as *amici curiæ*,  
submit this brief asserting the constitutionality of the  
Act of Congress of June 10, 1922, 42 Stat. 634

involved in the above entitled suit and asserting in addition that the elective compensation laws of a state may apply to a longshoreman injured on a vessel or to other maritime workers so injured even without this statute. They hope that the brief may be of assistance in the decision of the important question before this Court. They represent respectively the Council of American Shipbuilders, Inc., and New York and New Jersey Dry Dock Association and the Longshoremen's Union of America. The statute and the points of law involved in this suit are of general application and the decision of the court may in future operation of the rules laid down substantially affect the interest of their members.

Undersigned believe that the question of constitutionality is covered in the brief for the plaintiffs in error and will address themselves especially to the rule as laid down in *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, as applied in later cases.

The Council of American Shipbuilders is composed of several of the companies engaged in building and repairing ships in their shipyards situated on the Atlantic and Pacific Coasts and on the Great Lakes.

The New York and New Jersey Dry Dock Association is composed of many of the leading companies operating shipyards on the shores of the States of New York and New Jersey within the territory known as the Port of New York.

At the present time a shipyard workman, when engaged on new ship construction in the shop, on the pier, or on navigable waters, or when engaged on ship



repair work in the shop or on a pier, comes within the Workmen's Compensation Law of the State in which his employer's plant is situated. If this same workman be employed on an old ship to make repairs thereon and while it is in the dry dock of his employer, or is tied up to his employer's pier, then several of the State courts have held that he is outside the Workmen's Compensation Law and exclusively within the jurisdiction of the Admiralty Courts.

Out of those conditions have arisen confusion as to the character of a workman's employment, whether maritime or not; difficulty of determining the actual place at which an accident occurs, and disputes as to coverage by insurance.

The act of Congress of June 11, 1922, amending Sections 24 and 256 of the Judicial Code removes the confusion recited above by placing all the workmen of shipyards within the Workmens Compensation Law of the state in which their employer's yard is situated, and, therefore, the members of the Council of American Shipbuilders and of the New York and New Jersey Dry Dock Association are vitally interested in maintaining the said Act of Congress, and in establishing the rule that repair work on ships is a local matter which may be regulated by an elective State Workmen's Compensation Act.

The Longshoremen's Union of American represents 140,000 longshoremen, 60,000 of whom are in the Port of New York. More than nine-tenths of them are employed not by ships or ship-owners, but by local contracting stevedores, their work is done locally, and it is

important to them that they be subject to the local Compensation Law when on the ship, as they are covered by it for accidents occurring off the ship. Under the Act of Congress of June 10, 1922, 42 Stat. 634, permitting State Workmen's Compensation Acts to apply to injuries sustained by persons in maritime service, other than masters and members of the crew of vessels, they have been enjoying the benefits of uniformity of law in respect to their compensation both on the ship and on the shore. Their occupation is hazardous, accidents, serious in their nature, are frequent. Twenty-five per cent. of the cases heard by the Compensation Commission of the State of New York in New York City involve accidents in longshore work, a large percentage having happened on the ship. It is important that this uniformity of protection be continued and the Longshoremen's Union sees no other satisfactory way of achieving this result than to permit the application of the State Workmen's Compensation Laws to both ship and shore parts of the single job of longshore work.

#### Statement of the Facts.

Eugene Hayes, a stevedore, was killed by a fall into an open hatchway on September 5, 1922, while working on the steamship *West Islip* at San Francisco, in the unloading of a cargo of coal. The vessel was tied to her dock at the time of the accident, although afloat upon the navigable waters of San Francisco Bay. James Rolph Company, the defendant in error, was Hayes' employer, and was insured in defendant in

error, General Accident, Fire and Life Assurance Corporation, under a policy of workmen's compensation insurance. It had of its own accord taken out this policy in order to bring itself within the protection of the California Workmen's Compensation Act which, as to the parties in this suit, was elective. It appears that defendant in error, James Rolph Company, maintains docks and storage facilities in San Francisco to handle coal imported by it. Its office force, officers, bookkeepers, janitors, weighers, dock masters, deliverymen and wharf laborers are wholly within state jurisdiction, and subject to the local laws unless the wharf laborer happens to be injured while aboard the ship which he is temporarily engaged in unloading.

#### POINT I.

**An Elective State Compensation Act May Apply to Longshore Work.**

1. A longshore job is a unit, part done on the dock, part on the ship or barge; the land part is subject to the State Compensation Act, so that the ship is subject to State Law in respect to longshore work in every port she enters, and to apply maritime law to the part done on the ship will not protect the ship against State Laws while taking on or discharging cargo.

*Southern Pacific Company v. Jensen*, 244 U. S. 205;

*State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263.

2. Longshore work is done normally under a stevedoring contractor, a local concern, by workmen locally resident, the work is done locally; the fact is that the job done on shore is local and under local law, the part done on the vessel is also "a local matter" and may to some extent be subject to State Law.

*Western Fuel Company v. Garcia*, 257 U. S. 233.

3. An elective compensation act does not, like a compulsory compensation act, *displace* the maritime law of torts, it *supplements* and modifies it. As to maritime torts such an act is truly elective since the method used to induce the election as to land torts, the withdrawal of defenses under common law, cannot apply to maritime torts.

*Grant Smith-Porter Ship Company v. Rohde*, 257 U. S. 469.

4. An elective compensation act may apply to a local matter, where uniformity of maritime law is not necessary and parties electing it for a local employment will not have an action in the admiralty courts for maritime torts happening in the course of such employment.

*Grant Smith-Porter Ship Company v. Rohde*, 257 U. S. 469.

5. The circumstance that work is done under a maritime contract does not prevent the application of State law in case the matter affected is local and not

national in its scope; it is, however, an element to consider in determining whether uniformity of maritime law is necessary in respect to the particular matter.

*Cooley v. Board of Port Wardens*, 12 How. 299.

*Morgan Railroad and Steamship Company v. Louisiana Board of Health*, 118 U. S. 455.

*Western Fuel Company v. Garcia*, 257 U. S. 233.

*Grant Smith Porter Company v. Rohde*, 257 U. S. 469, relying on and explaining *Western Fuel Company v. Garcia*.

## POINT II.

The rule of *Southern Pacific Company v. Jensen*, 244 U. S. 205, that a compulsory state compensation law may not apply to that part of the longshoreman's job done on the ship, in order to preserve uniformity of law in respect to the ship in all ports, will not prevent an elective workmen's compensation law from applying to the part of a longshore job done on the ship since, under *State Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263, the part of the same job done on the dock is subject to state compensation law.

In the *Jensen* case the court said that the uniformity of the maritime law is not absolute. The law of the state may regulate matters subject to the admiralty law unless "it contravenes the essential purpose expressed by an act of Congress, or works material prej-

udice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Clearly no statute of Congress will be affected in the instant case if the state law takes effect. Congress has expressed its opinion that the state law should apply; the rules of the admiralty law concerned are the same as those which in the case of *Grant-Smith-Porter Co. vs. Rohde*, 257 U. S. 469, were supplemented by an elective state compensation act; that case involved a tort, as this involves a tort, it is the tort, not the contract law which applies. And it was held there that "Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." We will later discuss the distinction the court made between this case and the *Jensen* case, in which the act was compulsory.

In the *Jensen* case the court illustrates its position as to uniformity by this expression, "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish; and freedom of navigation be-

tween the states and the foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a material man's lien condemned in *The Roanoke*". *Southern Pacific Company vs. Jensen*, 244 U. S. 205, 217. It was the protection of the ship as an instrument of maritime commerce and the protection of maritime commerce itself, which was the object of the Court. The opinion is authority for the point that where the uniformity of law is essential to safeguard that commerce or where an interest is essentially national and not local, the admiralty law and not a state law must be applied. The point is clearly brought out in the reference to the Commerce clause which the Court makes in its opinion. "Where the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the states, such as transportation between the States, including the importation of goods from one state to another Congress can alone act upon it and provide immediate regulations. *Southern Pacific Company vs. Jensen*, 244 U. S. 205, at p. 217, quoting *Bozeman vs. Chicago and Northwestern Railway Company*, 125 U. S. 465; *Cooley vs. Board of Port Wardens*, 12 How. 299; *Morgan Railroad & Steamship Company vs. Louisiana Board of Health*, 118 U. S. 455.

It is not, therefore, that the admiralty rules of tort cannot be modified or supplemented by State law. They have been so modified under the decisions in *Western Fuel Company vs. Garcia*, 257 U. S. 233, and

*Grant Smith-Porter Ship Company vs. Rohde*, 257 U. S. 469, but it is the *effect* or the *result* of the application of the State law in operation which determines whether it may modify or supplement admiralty law. It is necessary, therefore, not to consider the law theoretically and by itself, but the law in operation among the facts, to determine whether uniformity under the maritime law is necessary in the case affected or whether a local interest is involved and to allow a local law to take effect would help rather than impede commerce and would not destroy the uniformity of admiralty law in its essential purpose.

The quotations from the *Jensen* case make it clear that the mind of the court was preoccupied with the ship, and that in the interest of the ship, uniformity of law was insisted on. It was to protect the ship from the expense and annoyance of being subjected to a multiplicity of laws differing in every port that the New York compulsory compensation law was held unconstitutional. The court seems to have considered that by its decision it was assuring the ship uniformity of law in respect to discharging and taking on cargo in all the ports of the United States.

This work, longshore work, is not done by the crew of the ship but by local workers, hired to work only in the port, and not to accompany the ship from port to port. Their engagement is only for this local work, and they form a part of the local labor force. Part of their work is done on the dock, part on the ship. The same longshoreman may be at one moment loading his



truck on the dock, at the next on his way up the gang-plank, and then depositing the load on the dock or in the hold of the ship. One day he may be on the ship piling bales of goods in a mat to be lifted overside to his fellow worker on the dock, the next, himself receiving the bales as they come over the side on to the pier. During the whole process he is working for the same employer, usually also a local man, a local stevedoring contractor, only rarely, the owner of the ship, and to him and his employer, both shore work and ship work are one and the same job, entered into under the same contract.

It was only recently that the courts decided that the law of the sea applied even to the work done on the ship by these local laborers, especially where they had no contract with the ship, but were employed by a local contractor. In fact so little was it formerly believed that admiralty law necessarily affected even the contract of the stevedoring concern with the ship that even as late as 1889 it was only with great hesitation and after balancing decisions *pro* and *con* that it was decided that a longshoreman employed by the ship could sue her in the admiralty court for contract. *The Gilbert Knapp*, 37 Fed. 209. And only in 1914 was it finally held, after conflicting decisions in the lower courts, that a longshoreman, employed by a local contractor, could sue him in admiralty for a tort. *Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 52. We are not contesting the doctrine, but we believe that the fact that the sea borne commerce of the United States flour-

ished under a rule which applied the shore law of its state to the whole occupation of the local longshoreman, is evidence that there is no vital need that a uniform maritime law apply to the half of a longshoreman's job carried on aboard ship.

That the land part of the longshoreman's job is subject to the local state law was decided by a unanimous court *State Industrial Commission vs. Nordenholt Corp.*, 259 U. S. 263, and therefore that the state compensation law applies to any ships entering New York harbor and discharging or taking on cargo. As a result in practice, the exclusion of the same law from application to the part of the longshoreman's job on the ship, had the effect not of securing uniformity of law applicable to ships in every port, but actually brought about a *diversity of law on each longshore job* in each port. The ship must insure her liability under the state compensation law for the longshoremen, while working on the dock at discharging or loading her cargo, so what can be gained by preventing that same law from applying to the work done on board, if the owner wishes? Certainly the burden on commerce is not lessened.

## POINT III.

In the normal case of unloading or loading a ship the work is done by independent local contractors, not the ship, who employ local men and all of whose work is local. As to them uniformity is only possible by allowing the state law to apply to work done on water as it does to work done on land.

In laying down a rule to govern the rights and remedies under the contract of a longshoreman, the court should consider, not the exceptional case of a ship contracting directly with longshoremen but the normal case where a ship owner makes a contract with an independent local contractor, a master stevedore, to discharge a cargo, and that local contractor hires the longshoremen. So far as the crew aid in the work, so far as officers of the ship superintend it, a different situation obtains. They are bound by contract with the ship, they are not local but transitory workers. Their rights are governed by the peculiar law of the sea affecting seamen; their right of recovery is quite different from that of the longshoremen. The latest expression of this clear distinction between seamen and longshoremen is § 20 of the Merchant Seaman's Act, 1920, which gave to seamen and not longshoremen the same rights as the employees in interstate commerce. We shall later revert to this question of the difference in law between seamen and land workers at maritime work.

In this usual case the employer is a local business concern, the employee is a local workman, the job is

done locally. The employer is subject to the local compensation law in respect to the longshore work done on the dock, the job is legally a local matter as to that half of it, and it is surely not in the interest of commerce or necessary for the "proper harmony" and uniformity of the admiralty law in its "interstate and international relations" that the admiralty law be applied to the maritime part of the job. The situation is on all fours with that in *Grant-Smith-Porter Co. vs. Rohde*, except only that the contract of employment was maritime, which did not prevent the local law from being applied in *Western Fuel Co. vs. Garcia*. The employer is necessarily subject to the local compensation act in respect to this whole land employment, including half of the longshore job; his interest is in a uniformity of law applying to the whole job and not a situation which will compel him to cover his risk on the ship under a different law from that which covers his risk on the dock. Premiums of insurance are fixed on the pay roll and it will be impossible to fix the amount of wages which should be allocated to the ship and to the dock when the same individuals frequently pass from one to the other; as a result the premiums in each case will overlap, and the employer will be required to pay more than he could in case a single law applied.

In considering this question in previous cases the court has repeatedly said that it would give great weight to factual considerations. No better illustration of the need for holding that the longshoremen are engaged in a local occupation is to be found than in

the figures relating to the employment of longshoremen in New York City. There are in all about 24,900 longshore workers in the Port of New York, and of their employers 126 are stevedores coming within the terms of the State Compensation Act as to their whole labor force, unless longshoremen while on the ship are excepted, and only 8 are shipping companies. These eight steamship companies employ about 250 men each, making only some 2,000 men who are employed by shipping companies directly rather than by the local independent contractors, while 22,900 are employed by local employers. *This makes a ratio of 11 men employed by local contractors to 1 taken on by a marine company.* Bearing these figures in mind it is easy to see why the longshoremen believe that they are doing local work and should have the benefit of the local compensation statute.

On the point of the effect of the admiralty rule in operation upon local workers, employed in drydocks and about ships, the Committee on the Judiciary of the House of Representatives says in its report on the Act in question in this case:

"Economically, port workmen and seamen are distinct. Said a representative of the New York and New Jersey Dry Dock Association at the Hearing before the Committee on the Judiciary on H. R. 5351:

'I think everyone who has given this question consideration believes in the advisability of a uniform Federal Statute covering seamen who are

peripatetic individuals, if I may use such a term in connection with sailors, and that the local workers—the longshoremen and repairmen—should come under the State laws for this reason. The Supreme Court has said that uniformity is desirable, and it is so far as sailors are concerned. I represent the dockmen who are essentially engaged in work along the coast. So far as the workers are concerned, they are men of fixed habitation, and it is thoroughly desirable that their compensation should be in general accord with that of other workers in a similar capacity, working in a shipyard, and it is merely desirable that they should have compensation covering them throughout their employment.’ ”

67th Congress, Second Session, Report No.  
639. *Status of Longshoremen.*

We append the Reports of the Committees on the Judiciary of the Senate and House on the act of Congress of June 10, 1922, 42 Stats. 634, amending sections 24 and 256 of the Judicial Code to permit state workmen's compensation acts to apply to injuries sustained by persons in maritime service, other than masters and members of the crew of vessels.

## POINT IV.

Many manufacturers, brick makers, lumber and coal dealers employ temporarily to load and unload the men usually employed in their local occupations, whose work though maritime in its nature is local.

A serious condition will arise in the case of the myriad of employers whose workmen occasionally load or unload ships or barges. A typical case is that of *Keator v. Rock Plaster Mfg. Co.*, 224 N. Y. 540. There the *Rock Plaster Company* had sent its own employee to the dock to aid in unloading a barge, evidently its common practice, and he was hurt while engaged in the work.

Another instance is the case of the brick yards which are near the water and ship their product in barges or schooners. Their own men are called from work in the yards and put to wheeling brick from the dock to the barge and piling it on board. These men the employer insures and must insure under the state compensation act. Their employment is local in the yards and in the loading process so far as an indeterminate point on the gangplank, it then becomes abruptly maritime. Clearly no national interest would make it necessary that the beneficent provisions of the state compensation law to which the rest of their employment is subject, should cease to protect them in the barge or ship. Another very usual instance of incidental maritime work occurs in the case of coal trade. Coal yards

on the shores of navigable waters, manufacturers whose plants can be reached by barges or ships, are accustomed to send their men employed usually on exclusively shore work, to unload the cargoes of fuel which come to their docks.

So very common is it for an employer to have some maritime work done in connection with his business, that in one large state compensation fund 40% of the employers insured, as having incidentally some maritime work done, were affected by the rule destroying uniformity of law in respect to the land and the maritime parts of their work. (67th Congress, 1st Session, Report No. 94, Senate, p. 3.)

Here in an exaggerated form is apparent the confusion which would ensue from the employer's side if a separate law must cover all work done under a maritime contract, for the great majority of the cases were loading or unloading barges or vessels, or work on ships which had been at sea. To lay down the rule that because work is done under a maritime contract it must be held to be subject exclusively to admiralty law, would cause such evident confusion in these cases, that we are confident that the court will not so hold.



## POINT V.

As to the longshoremen who are local men working in one locality, usually under local employers, uniformity can only be attained by allowing state law to apply to work on the ship as it applies to work on land.

It is vitally important to the longshoremen that the benefit which they are now getting under the state compensation acts be not cut off. It is also of great importance to them that a single uniform law govern the whole longshore job, the shore part as the ship part. The Longshoremen's Union emphatically believes that on the basis of its experience the longshore job should be treated as local and uniformity be assured by allowing the local law to apply to the work done on the ship. The Union has over 140,000 members in the country at large, and 60,000 in New York State; it represents men scattered all over the United States, and on their behalf it prays its court not to sacrifice the unity in the law of compensation on the job for a unity of the law of the ship which we have previously shown to be wholly illusory even as to the ship.

The longshoremen are local workmen who form part of the local labor force in the cities where they work. They do not sail from port to port as do seamen, they go to work in the morning from their homes to which they return at night. They have ever been distinguished from seamen, the privileges of the Marine Hospitals are not for them. They are not granted the rights of recovery of damages given to seamen under

§ 20 of the Merchant Seamen's Act of 1920; in lieu they have had the medical care and the benefits given by the compensation laws of the several states to all the local employees with whom their work local in its nature, assimilates them.

This uniformity is doubly important to its members. For them a longshore job is a single job, for a single employer under a single contract of employment. They know their rights under their local compensation act, they are acquainted with the procedure, they realize that they are getting the same treatment as their fellows in the labor world of their own state, they ask no more. They are not like seamen traveling from one port to another, following the course of world commerce, as it may shift from one trade route to another; they are bound to the city in which they live, dependent as are their fellows in the city and state and their employers upon the fortunes of the local community.

They and their employers have adjusted themselves to the existing situation. Both sides are working under the state law, and there is no evidence which has come to their knowledge, that this has unduly burdened the industry. It would create a very serious situation if these rights were suddenly taken away, and they were forced to rely on the antiquated maritime law of damages in case of accidents happening on the ships. The number of those accidents is very large. About 25% of the cases handled by the Compensation Commission in New York City, are the result of longshoremen's injuries; at least half happening on the ship. Industrial

peace is an important element in the prosperity of American trade, and confusion of laws on so important a question will not tend towards that relative contentment of mind from which alone it can come.

The longshoremen deliberately prefer to remain under state compensation laws. The state acts apply to them all the time and in all employments. Their provisions differ widely in different states, in respect to maximum and minimum of cash benefit, to provisions for survivors, to the important medical benefit, and as to details of administration. No federal compensation act could agree with the statute in any state, and discontent would inevitably result from the variety in provisions and in administration. Furthermore, under a Federal statute based either on the commerce clause or on the admiralty power, there would remain a wide fringe of cases in which it would be uncertain whether state or federal act applied. The complicated questions of when is an act in commerce, which have sent to this court so many cases in relation to railway employees, would arise again here. The maritime power is clearly unsatisfactory as a basis for compensation. It does not extend to the shore, and cannot there displace the state act, it confuses the district groups, the longshoremen and seamen, with widely varying legal rights at present. The expense and confusion of being subject to two separate jurisdictions, the state for some accidents, the federal for others, is apparent. More serious is the delay in payment of benefit and in medical treatment which would ensue from a divided jurisdiction over a

single job. In the many border line cases which would inevitably appear, the two systems of compensation would each try to put the burden on the other and in the contest between them, the unfortunate worker would suffer.

#### POINT VI.

**An elective compensation law may supplement the maritime law of torts.**

In *Grant-Smith-Porter Co. v. Rohde*, 257 U. S. 469, a carpenter working on a ship, not yet completed, was injured while the ship was in navigable waters of the State of Oregon. Oregon had an elective compensation act which employer and employee had accepted. The Supreme Court expressly said that the carpenter would ordinarily have had a right to sue in admiralty for a tort in respect to the injury. However since he and his employer had accepted the elective compensation act of the State, they were subject to that law and Rohde could only go to the state compensation commission for his compensation under that law. The state elective law "supplemented and modified" the admiralty law of torts, which still remained in force to apply to maritime accidents not happening to persons under the elective compensation law. So the maritime law of torts, in itself, is not "a characteristic feature of the general maritime law" which cannot be supplemented by state law. A state elective compensation act may, even as to persons who have accepted it, exclude the operation of

the maritime tort law and will not "work material prejudice to any characteristic feature of the general maritime law."

It is true that the state law may thus modify the maritime law only in local matters, but the point made here is that this case is authority for the position that the maritime law of tort may be supplemented by an elective compensation law, and in this case it is the same law, the maritime law of tort, which is concerned. Though the longshoreman in this case was working under a maritime contract, he is not suing in contract but in tort.

The determining consideration then must be whether the work is so far of a local nature that the application of the state law will not "interfere with the proper harmony of that (maritime) law in its international or interstate relations." We repeat that it is only from a study of the law in its operation, the law applied to the facts, that this can be determined.

## POINT VII.

The court has permitted the state law to change the maritime law regulating torts to a longshoreman by permitting the recovery of damages for death; it has frequently allowed maritime contracts to be regulated by state laws and to displace existing maritime law.

It remains to consider whether the circumstance that work is done under a maritime contract, prevents its being local so that the maritime law only can apply. The decision of *Western Fuel Co. vs. Garcia* is a conclusive answer in the negative. There the longshoreman was killed on a ship, and the state law granting damages to certain persons in case of death, was applied to his case, the court saying that "*the subject is maritime and local in character*" (italics ours). This point was emphasized in *Grant Smith-Porter Co. vs. Rohde* when the court said, "In *Western Fuel Co. vs. Garcia* we recently pointed out that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court." So a principle applied in a case of

injury under a maritime contract, was held to permit the application of the state elective compensation act.

The court in the *Rohde* case, after stating the principle, does insist on the point that *Rohde* was not working under a maritime contract but this can be reconciled with the *Garcia* case and with the court's own words just quoted, only if it means that employment under a maritime contract is one of the elements which must be considered in deciding whether a particular application of the local law is to be permitted. The court could not have meant the clear contradiction with itself implied in the theory that the fact that the employment under a maritime contract must be regulated by maritime law. Notably is this so in cases like longshore contracts where half of the job is admittedly local.

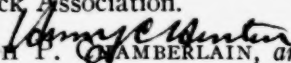
Furthermore the *Garcia* case does not stand alone as authority for the proposition that the maritime law in respect to contractual liability may be modified by state law. In *Cooley vs. Board of Port Wardens*, 12 How. 299, the pilotage law of Pennsylvania was held valid although "regulations of navigations", p. 316. The pilotage contract was by that act imposed on a ship and the existing law changed as Judge McLean declares in his dissent at p. 323.

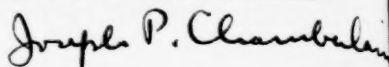
Maritime insurance is a maritime contract, *Insurance Co. vs. Dunham*, 11 Wall. 1, but the states have freely regulated and have changed the formerly existing rules of contract applying to these contracts. For example § 169 Insurance Law of New York changed

entirely the old rule of marine insurance that any person could effect insurance "for whom it may concern" by limiting the right to person with *bona fide* interest. *Hagedorn vs. Oliverson*, 2 M. & S. 485.

Respectfully submitted,

HENRY C. HUNTER, *amicus curiæ*  
and attorney for Council of  
American Shipbuilders, Inc., and  
New York & New Jersey Dry  
Dock Association.

  
JOSEPH P. CHAMBERLAIN, *amicus*  
*curiæ* and attorney for Long-  
shoreman's Union of America.





## APPENDIX A.

67TH CONGRESS, } 2d Session. }	HOUSE OF REPRESENTATIVES.	{ REPORT No. 639.
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## STATUS OF LONGSHOREMEN.

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JANUARY 31, 1922.—Referred to the House Calendar and ordered to be printed.

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Mr. CHANDLER of New York, from the Committee on the Judiciary, submitted the following

## REPORT.

[To accompany S. 745.]

The Committee on the Judiciary, to which was referred the bill (S. 745) to amend section 24 and section 256 of the Judicial Code, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

This bill is intended to carry out what the committee believes, after careful consideration, to be the correct solution of the problem of providing compensation for port workers. Previous to the decision of the Supreme Court of the United States in the case of *Jensen v. Southern Pacific Co.*, no difficulty had arisen on this head and the courts and administrative authorities had acted on the assumption that the State law could grant compensation to these as well as to other

workers within the State. (*Lindstrom v. Mutual S. S. Co.*, 132 Minn., 328; *Kennerson v. Thames Towboat Co.*, 89 Conn., 367; and *North Pacific S. S. Co. v. Industrial Accident Commission*, 163 Pac., 199; *Southern Pacific Co. v. Jensen*, 215 N. Y., 514.)

The *Jensen* decision held in the case of a longshoreman employed by a ship, who was injured under circumstances amounting to a maritime tort, that the compulsory compensation law of New York State could not apply. They considered that the cost of providing compensation in all the ports called at by a ship, and the differing compensation laws in different States would be a burden on commerce and a substantial interference with the uniformity of maritime law.

That decision in the interest of uniformity for the shipowner overlooked uniformity for the workmen or uniformity for the large class of employers within the State, part of whose work was maritime, while the rest was necessarily covered by the State compensation laws and for whom the uniformity provided for the shipowner meant confusion and lack of uniformity. Since the decision in the *Jensen* case the courts and the compensation commissions have been confronted with many difficult cases well illustrating the confusion into which the *Jensen* case had thrown the various trades affected by the decision. The effects of this confusion were clearly brought out in the hearings before the committee by representatives of the employers and by representatives of the employees affected.

## DRY-DOCK WORKERS.

Economically, port workmen and seamen are distinct. Said a representative of the New York and New Jersey Dry Dock Association at the hearing before the Committee on the Judiciary on H. R. 5351:

I think everyone who has given this question consideration believes in the advisability of a uniform Federal statute covering seamen who are peripatetic individuals, if I may use such a term in connection with sailors, and that the local workers—the longshoremen and repair men—should come under the State laws for this reason. The Supreme Court has said that uniformity is desirable, and it is, so far as sailors are concerned. I represent the dockmen, who are essentially engaged in work along the coast. So far as the workers are concerned, they are men of fixed habitation, and it is thoroughly desirable that their compensation should be in general accord with that of other workers in a similar capacity, working in a shipyard, and it is merely desirable that they should have compensation covering them throughout their employment.

## LONGSHOREMEN.

It is easy to understand the reason why the representatives of the workmen ask for compensation under State laws. The longshoremen are no more peripatetic workmen than are the repair men. They do not leave the port in which they work; they do not go into dif-

ferent jurisdictions. They are part of the local labor force and are permanently subject to the same conditions as are other local workmen. The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not.

#### PART-TIME MARITIME WORKERS.

The large class of employees who occasionally work at loading or unloading vessels are subject to the State laws when at their actual tasks. They get compensation at State rates and under the conditions laid down in State laws by State commissions. If, in accidents happening during their longshore work, they are subject to a different law, the lack of uniformity will be the element in the situation which will strike their minds. That this class is in the aggregate large is evident. Maritime jurisdiction is not limited to the great seaports. The thousands of canal boats and barges tied up to the docks of manufacturing establishments, loaded with coal or raw materials, are subject to the admiralty jurisdiction just as much as an ocean liner at the dock in New York or Baltimore. These barges and canal boats are manned by a crew of one, so that the work of handling cargo is necessarily done by em-

ployees of the local plant. It is clearly desirable that in such circumstances the local law should govern the whole employment and that the men should get the same compensation whether they are injured working on the coal heaps of a manufacturing concern or barges at its wharf. This is but one instance of the many which will occur to the minds of men informed on the variety of the navigation, inland as well as seaborne, of this continent.

#### EMPLOYERS IN MARITIME WORK WHO ARE NOT SHIP-OWNERS.

For the employers of part-time maritime workers to be taken out of the State system of compensation for the maritime side of their work means confusion and annoyance as well as expense. They must keep account of the time spent in maritime work, and their attorneys will be forced to spend long hours in deciding what is and what is not maritime employment. They must insure their separate risks, and when the inevitable conflicts of jurisdiction arise between insurance companies, both master and man must await the issue before payments to the injured workman can begin. In order to secure uniformity for shipowners in all their ports of call, confusion of law for these classes of workmen and employees should not be called into being.

Very commonly, too, the employing stevedore is not the shipowner or the ship captain, but a local firm with offices on shore. Then there is again no question of lack of uniformity involved if the State law is permitted

to govern. Neither employing stevedore nor longshoremen leaves the State. Both remain in the port subject to local law and to local administration in exactly the same way as in case of employer and employee in a local warehouse or flour mill. But where the employing stevedore does not limit himself strictly to longshore work, if he employs his men at any other employment, as will frequently be the case, then if he is to have uniformity, it must be under the State law.

#### SHIPOWNER.

Only for the shipowner will uniformity result from preventing the application of State compensation laws, and the claims of this small class should not outweigh the needs of the other interests. Even a shipowner is more annoyed than burdened. Where he employs a large number of repairmen or longshoremen in a regular port of call he is not unduly burdened by the obligation to insure compensation. He has a superintendent at an office in the port, who can easily secure the protection as a part of his regular duties. If the company is a self-insurer, it must maintain an organization to take care of its risks, an organization with representation in each important port, so that it does not make a great difference whether those in one port act under the local laws while those in another must take care of accidents under another act. Before compensation, their liability for accidents to longshoremen varied in each State in accordance with the tort law, but no complaint was made of an undue burden because of this lack of uniformity.

## COST OF COMPENSATION.

At the hearing the shipowner's representative stressed the cost of the New York compensation law, but his clients were not treated differently from other New York employers. No burden was laid on American shipping, since all ships, foreign and domestic, were affected. If, however, a Federal compensation act were substituted he could not have substantially less costs unless the act carried substantially less benefits, and in such case a serious source of discontent would be introduced into the relation of capital and labor. A local laborer, a longshoreman, would find it hard to understand why his benefit was appreciably less than that of his neighbor, not employed in maritime work. An employee only occasionally employed at unloading barges would not appreciate why he should receive less if hurt at such work under the same employer than if he were working elsewhere in the same plant.

The important principles of compensation are promptness in payment and simplicity in procedure. Confusion of jurisdiction will stand squarely in the way of realizing them.

## CONGRESS HAS REGULATED SEAMEN.

Congress has always in legislating distinguished between these port workers and seamen. It has assumed full control over the relation of master and servant at sea. Federal legislation determines the character of the quarters in which the crew is to be housed,

the food to be served to them, hours of labor, reciprocal duties of seaman and officer. A Federal statute changed the age-long maritime rule which subjected a sailor leaving his ship to arrest, and made his return on board imperative. The rights of a seaman against the ship-owner in case of injury or sickness are not at all similar to those which govern the right of recovery in the same case in land employment. The owner must care for the sick or injured sailor; he must pay his wages until the home port is reached and then the United States Marine Hospital Service takes him into its protection till he is recovered to health. He is thus already to a degree protected by a form of workmen's compensation, since this duty of the ship and the care in the marine hospitals does not depend upon any fault imputable to the owner. His right to recover damages was strictly limited by the law of the sea, but Congress in the merchant shipping act of 1920 gave him a wide right to recover damages by putting him on a basis with the employees in interstate commerce.

#### PORT WORKERS UNDER CONTROL OF STATE.

Congress has hitherto left to the State control of the relation of master and servant in longshore work or in ship repair. State, not Federal, statutes require one day's rest in seven in these trades; State, not Federal, statutes regulate conditions of labor among these men of fixed habitation, and it has been, as a rule, in the State courts and under the State law that has been determined the duty of the employer to pay damages to



his employee injured in the service. Even where the employee had an opportunity to sue for maritime tort in the admiralty courts, he has not, in the main, attempted to avail himself of it, but has pursued this remedy in the tribunals of his State. Congress would be going far if it assumed control of the whole relation of master and servant in longshore and ship-repair work. It would even be doubtful whether Congress can regulate that relation on shore, and if Congress intends to leave in the main the regulation of this relation to local legislation, it seems desirable that the whole of the relation, so far as can be, should be left to the local law. As we have shown, the rights of seamen to recover damages for tort are bound up with their rights to maintenance, cure, and wages, and the other regulations of the relationship of master and servant at sea governed by act of Congress or by the admiralty law.

#### POWER OF CONGRESS.

This being clearly the desirable solution of the problem, has Congress the power to enact this legislation? The Constitution of the United States was conceived, not in a small narrow sense, but as an instrument for the government of a continent. The fathers intended that local affairs should be left to local control and that local responsibility should be developed by exercise of local government. They knew from experience, however, that national affairs should be regulated nationally and that local prejudices or local interest should not be allowed to stand in the way of national treat-

ment of problems not local in their scope. Certain powers they expressly cut off from the State, certain powers which they conceived as exclusively national they intrusted wholly to Congress, but in a wide range of important questions which they conceived of, neither as exclusively national nor exclusively local, they vested in Congress the power of control without refusing to the States the right of regulation so long as their regulation did not interfere with national interests. This question of the admiralty jurisdiction and the cognate problem of interstate and foreign commerce are the fields in which this supervision of Congress has been especially exercised. Where uniformity is not essential in maritime matters, the courts have upheld the rights of the States to pass legislation. The State legislation regulating the pilotage in the different States and, therefore, regulating a maritime contract (*Hobart vs. Drogan*, 10 Peters, 108) and imposing a charge upon shipping, compelling even vessels which did not hire pilots to pay half pilotage, has been held unconstitutional as "enacted by virtue of the powers residing in the State to legislate." The case for congressional action on pilotage is stronger than in respect to these harbor workers. The pilots are in themselves seamen, and the persons who must pay the fees are exclusively shipowners, while in the case of the harbor workers the persons affected are landmen and their employers are usually themselves land workers, so that the ship is not subject to lien or to suit in admiralty. When the pilotage cases were decided, it was not supposed that

there was any requirement of uniformity in the maritime law which would interfere with local regulation of a maritime subject, so that the case here was decided on the power to regulate commerce, though the court expressly says that Congress had the power under its authority to regulate navigation to pass a general pilot statute if it felt that such action was desirable. The court said that there were many subjects in this wide field, some operating equally on the United States in every port and some, like the subject in question (pilotage laws), as imperatively demanding "that diversity which alone can meet the local necessities of navigation" (*Cooley v. Port Wardens*, 12 Howard, 299, p. 319).

Upholding a State quarantine law against a direct burden on ships, the court said the matter is one in which "the rule that should govern quarantines may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River 100 miles from the sea, may be widely and wisely different from that which is best for the harbor of New York" (*Morgan S. S. Co. v. Louisiana Board of Health*, 118 U. S., 455, p. 465).

In view of the great variety in compensation statutes throughout the country, the great diversity in regulations which the several States have established to govern the relation of master and servant, where no injury happens to the servant, it is clear that the reasoning

in these two cases applies to the land workers engaged in unloading or repairing ships.

The Supreme Court has always held that the States might change or add to the maritime law. The courts have applied to maritime torts State laws giving the right of recovery in case of death. (*American Steamboat Co. v. Chase*, 16 Wallace, 531; *Sherlock v. Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.) In a recent pronouncement of that court on this question a statute of California giving such right of action was upheld and a section of that statute limiting the period in which the action for death could be brought was also adopted as part of the maritime law. (*Western Fuel Co. v. Garcia*, decided Dec. 5, 1921.) It again announces that the State statutes will be applied when it "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (Quoting *Southern Pacific Co. v. Jensen*, 244, U. S., 205.)

Even more recently (*Grant A. Smith-Porter Ship Co. v. Rhode*, decided Jan. 3, 1922) the United States Supreme Court has stated as its controlling principal that "as to certain local matters, regulation which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by State statutes."

If Congress has left to the States in the past the entire regulation of the relation of master and servant, including the regulation of the payment of damages for

injuries, why should it not continue in the same authorities the right to substitute a better system of securing justice to injured workers in these trades? As it affects the workman he may fairly say, with the Supreme Court of Maine, that "he insists that this court make their contract to square with the demands of real justice and plain common sense, that his right in the dual citizenship of State and Nation may not be unjustly infringed, and that the remedial legislation out of which the contract of labor sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal, and full." (*Berry v. M. F. Donovan & Sons*, 115 Atl., 250.)

Can Congress act as provided in this bill? In 1789, the First Congress under the Constitution passed the judiciary act, giving to the district court of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction \* \* \* saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," and this is the law to-day. (Judicial Code, sec. 24 and 256.) Under this clause State law, as it was at the time of suit, has been applied by State courts to cases arising under maritime contracts or as a result of maritime tort. "Under the grant by the Constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on maritime contract or for maritime torts can be maintained in the State courts." (*Manchester v. Massachusetts*,

139 U. S., 240, p. 262; *Atlee v. Packet Co.*, 12 Wall., 389; *Rounds v. Cloverport Foundry Co.*, 237 U. S., 303.) The principle was applied to torts happening as a result of a collision on navigable waters. (*Steamboat Co. v. Chase*, 16 Wall., 522; *Schoonmaker v. Gilmore*, 102 U. S., 118.) The authority of the State courts under the saving clause in cases of maritime torts has been recently discussed at great length by the Supreme Court of Massachusetts in *Proctor v. Dillon*, 129 N. E., 265, and the conclusion reached that the State courts must administer the State law.

If Congress could by this statute authorize the State legislatures to enact and the State courts to apply rules regulating the admiralty jurisdiction and preserve to suitors their common-law rights, why can it not, following the enlightened opinion of the age, which has substituted compensation for the right to sue for damage at common law, permit the local jurisdictions to provide compensation for workmen who are, as to all other matters, within their jurisdiction.

There is another reason why the compensation laws of the State should be allowed to take effect. The jurisdiction of admiralty is strictly local. Accidents happening on the land are not maritime torts and no suit can be brought in the admiralty courts to recover for damage resulting therefrom. *Keator v. Rock Plaster Co.* (256 Fed., 574) is the last expression of this rule. It has been frequently decided that the admiralty jurisdiction can not be extended by act of Congress, so that a Federal statute permitting recovery for

a tort happening on the shore would be an invasion of the reserved rights of the States. (*The Blackheath*, 195 U. S., 361, Hughes on Admiralty, 2d ed., p. 195.) Therefore, so far as the relation of master and servant on land is concerned the State laws will always provide regulation of the duty of the master to make payment for an injury happening on shore. The State courts and compensation commissions have no general rule to follow in such accidents. In New York the court, though not unanimously, holds that the State compensation law can not apply to accident happening on land, but that the State law of tort must be resorted to for a remedy (*Doey v. Howland*, 224 N. Y., 30), while in Maine the Supreme Court has recently held that their compensation law shall be applied where the accident happens on the dock. (*Berry v. Donovan*, 115 Atl., 250.) But the longshoreman should be subject to the same law during the whole period of his work. If he is inevitably to be governed by the State law as to a part of his employment he should be permitted to have the benefits of that law during his whole employment.

Consequently, so far as accidents on land are concerned, the State law, either of torts or of compensation, must continue to provide a remedy for work accidents. Congress may have power to enact a compensation law for these accidents. Under the admiralty provision, Congress can not shut out the right of the States to provide a concurrent remedy in tort. The right to a remedy for injury is confirmed in the constitutions of many States. (Injury to persons to have

certain remedy, Ark., 11, 13; Minn., 1, 8; Mo., 11, 10; N. H., 1, 14; Okla., 11, 6; Wis., 1, 9.) (Every person ought to find certain remedy in laws for injuries he may receive to person, Ill., 11, 19; Mass., Pt. 1, 11; R. I., 1, 5; Vt., 1, 4.) (Injury to person to be redressed by due course of law, Conn., 1, 12; Del., 1, 9; Fla., D. R., 4; Ind., 1, 12; Kans., B. R., 18; Ky., 14; Me., 19; Miss., 111, 24; Nebr., 1, 131; N. C., 1, 35; Ohio, 1, 16; Oreg., 1, 10; Pa., 1, 11; S. Dak., Vi., 20; Tenn., 1, 17; Tex., 1, 13; W. Va., 11, 17.)

In some cases the amount to be recovered for death can not be fixed by law. (Right of action to recover damages for injuries resulting in death not to be abrogated, and amount recoverable not to be subject to statutory limitation, Okla., 111, 7; Utah, XVI, 5; N. Y., 1, 18, 19.) (Legislature to have no power to limit amount to be recovered for injuries resulting in death, Ky., 54.) (Amount of damage recoverable by civil action for death caused by wrongful act, neglect or default of another, not to be limited by law, Ohio, 1, 19a.) (Legislature not to limit amount to be recovered for injuries resulting in death, but in case of death from such injuries, right of action to survive, and legislature to prescribe for whose benefit action to be prosecuted, Ark., V, 32; Pa., III, 21.)

So that complete uniformity of law in respect to longshoremen and marine workers in the interest of shipowners is not possible without changing, not the laws but the constitutions of the States.



The legislation provided by this bill, which would amend sections 24 and 256 of the Judicial Code, so as to fix the status of longshoremen, is imperatively necessary as a matter of simple justice not only to longshoremen themselves but to their employers as well.

The situation as it exists to-day is exceedingly confused and disconcerting with reference to remedies depending upon the peculiar character of the longshoreman's employment at the moment of injury. If he is working on a dock moving freight from one pile to another, the compensation law of the State applies. If he is injured while working on the vessel, moving freight, his remedy is under the maritime law of the United States. And if he happens to be injured while working on a gangplank, a kind of twilight zone between sea and land, both his status and his remedy are uncertain. To add to the confusion and annoyance, if the longshoreman happens to be shifting freight that is moving in interstate commerce, he has no remedy under the compensation law of the State of New York, but must apply to the State courts for his remedy under the common law of torts.

This extremely confusing situation is doubly deplorable, for it works not only a great injustice to the men themselves, but to their employers as well, who are compelled to carry double insurance, first, under the employer's liability act of the State, second, insurance that will protect themselves against the different kinds of liability that may arise under any one of the classes of cases just mentioned.

The importance of this question and the necessity for this legislation are apparent when we consider that in the State of New York alone 10 per cent of the accidents reported are accidents to longshoremen, and that no less than 84 accidents were reported as occurring in the loading of a certain vessel in the port of New York.

There is little doubt that the legislatures of the States assumed that the various compensation acts passed by them would apply to longshoremen, even though they should be injured while temporarily employed on vessels, but in the case of *Jensen v. Southern Pacific* (244 U. S.) the Supreme Court held otherwise, declaring that the application of the New York State compensation law, or the compensation law of any other State, would tend to destroy the general uniformity of the maritime law.

In closing, attention is directed to the fact that the law held involved in the *Jensen* and *Knickerbocker* cases differs from the law provided by this bill in that it applied not only to longshoremen, but also to the sailors on board, while the law provided by this act is intended to apply only to longshoremen. Furthermore, it is contended that the relationship of longshoremen to commerce is local in character, and, as such, may properly, as in the case of pilots, be governed by State statutes.

## APPENDIX B.

CALENDAR No. 108.

67TH CONGRESS,  
1st Session.

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SENATE.

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REPORT  
No. 94EXTENSION OF BENEFITS OF THE STATE  
WORKMEN'S COMPENSATION ACT  
TO SEAMEN, ETC.

JUNE 6, 1921.—Ordered to be printed.

Mr. BORAH, from the Committee on the Judiciary, sub-  
mitted the following

## REPORT.

[To accompany S. 745.]

The Committee on the Judiciary, to which was referred the bill (S. 745) to amend section 24 and section 256 of the Judicial Code, having considered the same, report favorably thereon with the recommendation that the bill do pass with an amendment.

This bill is intended to meet the very serious situation which has arisen as a result of the decision in the Supreme Court that the Johnson amendment, act of October 6, 1917, was unconstitutional. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S., 149.) That amendment was intended to permit the extension of the benefits of the State workmen's compensation laws to seamen and other workers on or in connection with ships, who had by

the decision in the *Southern Pacific Co. v. Jensen* (244 U. S., 205), ceased to enjoy the protection of these laws and had been thrown back upon the relief which they could get either under the maritime law or the local law of torts. The class of longshoremen needs the protection of compensation as much if not more than any other class of workmen. Their occupation, so essential to the prosperity of the trade of the United States, is extra hazardous, both on account of its nature and on account of the pressure under which it must often be performed. It is unjust to these men and to their families that the burden of loss resulting from thousands of accidents annually should be left by the law on their shoulders. The resulting discontent and dissatisfaction is easy to understand. The ship-repair men form also a large class among whom injuries are frequent, and they find it difficult to understand why the carpenter, brass worker, or plumber employed to repair a ship in the harbor should receive no compensation, while if he were employed in a building on the dock, he would be protected by the State compensation law.

#### DISTINCTION BETWEEN SEAMEN AND LANDSMEN WHO WORK ON OR IN CONNECTION WITH SHIPS.

There is a clear distinction between the two classes, seamen and landsmen, who work in or about ships, who were confused in the Johnson amendment and in the situation which arose in the *Jensen* case. The distinctions are based upon the facts of their employment, upon the separate system of law which have hitherto been

applied them, and the character of employers which, in case of seamen, are ships or shipowners, and in the case of landsmen in the main, independent local contractors. The seamen in their normal life are migratory. They pass from port to port, from State to State, from country to country. To permit in their case the application of the varying laws of the several States in respect to injuries suffered in the course of their employment would be unfair both to the ship and to the seamen. Under these laws a seaman might be entitled to different amounts of compensation for different periods, different medical attention, depending upon whether an accident happened in the port of New York or the port of Philadelphia, or in New Orleans. The owner would be compelled to insure against an uncertain liability for he could never tell when his ship started out under what law he might be required to pay compensation. This difference not only argues against the application of State compensation laws but against the application of the general police legislation of the States in the relations of seamen to their employer. Seamen are subject to a special law of the sea which in the United States is nation wide. Congress legislates in respect to the conditions of employment of seamen and their relations with their employers. The rights of a seaman when injured in the course of his employment are governed not by the common law of torts, but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care,

and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the United States Marine Hospital is open to him without expense on his part until he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. (*Sheude v. Zenith S. S. Co.*, 216 Fed., 566, 570.) The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the merchant marine act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.

The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions

of living are governed by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law, applying to seamen is inapplicable to their condition and no attempt has been made to apply it to them. They do not share in the advantages of the United States Marine Hospital, nor are their employers under any obligation to care for them in case of accident.

Their employers furthermore are not usually ships or shipowners. It is usual in the large ports for a local stevedoring firm to contract with the shipowner to load or unload his vessel and employ longshoremen, who, under his control handle the cargo.

Repairs are usually done under contract with a local contractor, so that the men who are actually employed in doing the work have no direct relation with the ship or shipowner. In nearly every case, too, the employers will have at least a part of their force covered by the State compensation law, so that for them uniformity will be secured only by putting the worker whom they employ in or about ships under the same State compensation law which governs their liability toward him when not so employed and their other employees.

#### GEOGRAPHICAL EXTENT AND COMPLEXITY OF THE PROBLEM.

Longshoremen and ship-repair men, especially the longshoremen, are not centered in the few great ports, and are not concerned solely with interstate or foreign commerce. Wherever a steamship or scow plies on

the internal waters of any State in the Union throughout the whole vast Mississippi waterways system, up and down the Hudson River, and on the great canals which link that artery of commerce with Canada and with Lake Erie, on the Columbia River in the Northwest, and the many streams carrying products of the South Atlantic States to the seaboard, are found the men who load or unload vessels or who work in their repair. In any one of the smaller river ports their number may be small and they may work only occasionally in connection with vessels, their regular employment being on land.

The extent and complication of the problem is graphically brought forward by the fact that 40 per cent of the employers insured in one large State compensation insurance fund employed men who were engaged to some extent in maritime work. For example, in the brickyards on the shores of the Hudson River it is customary for the regular employees of the brickyard to load the barges which then go down the river to the city where their brick are to be used, and, arrived at port, employees of the contractor who owns the cargo are taken off their strictly land work to unload it. A barge loaded with coal for a factory situated on a river or canal ties up to a factory wharf and a group of factory workmen are sent down to unload it. A vessel having a cargo of raw material for a factory ties up to a city wharf and the owner of the factory sends down his own foreman to superintend the unloading, and frequently members of his own force to



actually handle the cargo. Under these circumstances to compel the owner to secure compensation insurance for his land risk under a State act, often in a compulsory State fund, and cover his vague and uncertain maritime risk under a different law in a different carrier, would be unduly hard upon him. The employee, furthermore, would find it hard to understand why he should receive compensation differing in amount and differing in the method of recovery if he were hurt wheeling bricks in a brickyard or wheeling them on board a barge.

DIFFERENCES IN STATE COMPENSATION LAWS SHOW  
DIFFERING LOCAL CONDITIONS.

The compensation laws of the various States vary greatly in important particulars so that any attempt to cover longshoremen and repairmen while within the admiralty jurisdiction by a Federal statute will result in a great disparity between the compensation which men will receive in any locality under State and Federal statutes. The cash payments under compensation are usually a percentage of wages, limited by a maximum and a minimum. The percentage varies from 50 to 66 2-3 per cent in different States, the weekly maximum from \$22.50 in Oregon to \$7 in Porto Rico; the minimum from \$8 in New York to \$3 in Louisiana. Clearly a Federal statute fixing a single percentage of wages and a single maximum and minimum for the whole country will set up in every State a substantially different standard from that of the local law.

The widow, in some States, is provided for until death or remarriage. California provides for only 240 weeks and other States have other time limits.

The burial allowance is \$200 in four States but in Porto Rico it is only \$40. Total disability for life is provided in some laws and in others for limited periods, for but 260 weeks in Vermont, for example.

Medical service is unlimited in 16 States as to duration, while in Alaska and New Hampshire there is no medical care and in four other States it is limited to two weeks. The cost of medical care is unlimited in some States, but many fix the maximum, which in New Mexico, for instance, is only \$50. Compensation begins at once without waiting period in Oregon and Porto Rico, but in Maryland and Utah, the waiting period is 3 days and in 10 States, including New York, it is two weeks. Different methods, too, are adopted in different States in determining how far an injury interferes with earning capacity.

It would be hard to explain to a carpenter injured while working on a ship why he should receive a different compensation than a carpenter injured on land, or why his medical treatment should be different. It would be doubly hard to explain to a laborer in a factory or brickyard why his weekly check should be more or less if he is hurt wheeling bricks in a yard or shoveling coal in a factory or doing the same work on a barge. Seamen are a special class and are accustomed to being treated as such. Longshoremen and ship repairers are not; they have in the past been assimilated with their

fellow landmen, so that the reasons which would make it easy to explain to a seaman why his compensation should be different from that of other workers, would not exist in their case.

#### DIFFICULTY OF DETERMINING WHAT IS A MARITIME ACCIDENT.

The work of a longshoreman is partly on land, partly on the ship. He may be employed entirely on the dock in connection with a crane which lifts the barrels or boxes into the hold of the ship; he may be employed on the dock in shifting the barrels or boxes from one point to another to make them more convenient for the operation of loading; he may be busied on the ship in towing away the cargo, and he may be wheeling a truck from the dock up the gangplank to the deck of the ship. The admiralty courts have no jurisdiction to give him damages in tort for an accident in the course of his employment while he was on the dock; they have jurisdiction if the accident happens upon the ship and it is controverted under exactly what circumstances there will be admiralty tort while the man is on the gangplank. (*Keator v. Rock Plaster Co.*, 256 Fed., 574.)

In both the *Jensen* and the *Knickerbocker* ice cases stress is laid upon the circumstance that the accident involved was a maritime tort—that is, a tort which was subject to the admiralty jurisdiction. Says the court in the *Jensen* case: "The injuries which he [Jensen] received were \* \* \* maritime, and the rights and

liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." In the *Knickerbocker* case the court said, referring to the *Jensen* case, that it concerned "a maritime tort," and they held the Johnson amendment unconstitutional, as an attempt to apply the workmen's compensation laws of the several States "to injuries within admiralty and maritime jurisdiction." It has been frequently decided that Congress has no right to extend the limits of the admiralty jurisdiction (the *Lottawanna*, 21 Wall., 558), so that it is very doubtful if Congress has a right to enact a statute covering accidents to longshoremen while off the ship.

Clearly the whole employment of a longshoreman must be covered by a single act if he is to receive satisfactory protection. He must not be left in doubt as to which jurisdiction he must apply for his compensation. He must not be forced to apply to one jurisdiction in the event that an accident happens on land, to another in the event that an accident happens on the ship, with totally different remedies in each case, and be in doubt as to where to apply if he is injured while in the "twilight zone." The employer, furthermore, should not be compelled to divide his compensation insurance risk between two separate statutes, with necessarily varying terms. Several of the States compel all employers to insure their State risks in a State fund, and in these States, if a separate Federal act is established for the maritime risk, many employers will be obliged to carry insurance with both the State fund and a Federal in-

surance carrier. Disputes between the carriers will necessarily frequently arise as to which is responsible, and the consequences will be a sacrifice of that promptness in granting the relief sought which is one of the important elements in compensation.

#### DIFFICULTY AND COST OF FEDERAL ADMINISTRATION.

At the present time practically all of the States of the Union have systems of compensation with an administrative organization, usually a commission, to administer them. Administration by the courts has been tried and has been usually rejected in favor of administration by a commission which has means of trying promptly the cases presented to it in the different parts of the State under a simpler form of procedure than that usual in the courts. It would be very costly to establish, beside the State commissions, a Federal system to settle the compensation for maritime accidents to longshoremen and repairmen. Maritime accidents affecting seamen can be handled in the ports to which a ship returns after its voyages or at which it touches. In most of these ports there is an admiralty court to which appeals from the commission, if a commission is established, can be promptly and easily taken and, furthermore, seamen are accustomed to admiralty procedure and to the methods of admiralty courts. The witnesses are usually on board the ship, so that they will be carried with the ship to the port at which the hearing can be held and the rights of the parties determined.

Longshoremen and ship-repair men are scattered along all the navigable waters of the United States, fresh as well as salt, so that an administrative organization to decide promptly all the cases of accident to these men would have to be very widely extended, and on account of the few cases in many of the smaller ports the relative cost of administration would be very high. The witnesses would not, as in the case of a vessel, be carried with the vessel to a large port where an injury could be held, but a commissioner would necessarily go to the place where the accident occurred, or witnesses, at great loss of time and heavy expense, would have to be brought to a center often far distant from their homes. In a time like the present, when economy is so important, the saving to the national exchequer, if the administration of relief for these accidents is left in the hands of the State authorities, is no unimportant consideration.

In the interest, too, of the injured workman and of his employer it is important that there should not be a question of jurisdiction involving both delay and expense in the many cases of doubt as to whether an accident is a maritime injury or not. The importance of this point in compensation is not limited to the question of cash compensation alone, since all compensation acts provide for prompt medical care. Where, however, there is a doubt as to whether the accident is maritime or not and an attempt is made to cover the maritime accidents by Federal statute the two separate carriers under the Federal and the State laws will dispute which

is liable, and not only will the payment of the cash compensation be delayed, but the essential medical treatment will be apt to be given too late to accomplish its due effect.

THE CONSTITUTIONAL QUESTION IS ONE OF  
REASONABLENESS.

The State legislatures are not entirely prohibited from dealing with questions involved in the maritime law. Says the majority of the court in the *Jensen* case: "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. That this may be done to some extent can not be denied," citing the cases holding constitutional State statutes giving a lien upon a vessel for repairs in her own port and conferring the right to recover in death cases. "Plainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

"A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it, is now firmly established. Where the subject

is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations."

It could be fairly said that the State laws should not be applied to seamen, both because of the characteristic sea laws which govern the relations of employer and employee in that occupation and because of the interference with international and interstate commerce by water which might result from a change in legal status at each port at which the ship touches. The Johnson amendment, therefore, which applied to both seamen and other maritime workers, had to be held unconstitutional as a whole if the seamen were to continue to be governed by uniform statutes.

This bill avoids this difficulty. It does not permit the application of State legislation to seamen, so that the question presented is whether it will interfere with the characteristic features of the maritime law or the essential uniformity of the maritime law to permit the application of workmen's compensation acts of the several States to longshoremen and ship-repair men when under maritime jurisdiction. The characteristic law of the sea is not involved in the relations between these workmen and their employer, when, as will usually happen, the employers are not ships or shipowners, and even where they are ships and shipowners. The characteristic rules of the law of the sea affect seamen and



do not affect these land workers. So far as the laws of Congress protect ships and shipowners as such, those laws will not be affected by the application of the State compensation laws to this class of workman.

Whether it will seriously hamper commerce, to protect which the uniformity rule is invoked, to permit the application of the State compensation laws in this case is a matter of judgment based upon practical considerations. Congress may fairly be influenced by the fact that there was no such interference remarked prior to the decision in the *Jensen* case, and that there has been no great relief apparent to international or interstate maritime commerce since those statutes have ceased to apply to longshoremen and repairmen. No argument has ever been made to show on the facts that the application of these statutes would result in great injury to commerce.

Congress is the appropriate judge as to whether its own essential purposes expressed in its own acts are contravened by this bill.

Consideration of practical convenience both to employer and employee, of economy to the public, of promptness in the provision of compensation and medical care, all emphasize the importance of extending the State compensation laws to such local workers as longshoremen and ship-repair men during their whole employment and in extending those laws to the large class of men who are only from time to time and as a small part of their regular work occupied in loading or unloading vessels. The burden on maritime commerce

would be less under this rule than under a law imposing Federal compensation in case of maritime accidents, and great would be the burden upon and disadvantage to the employee and the employer from the necessarily discordant State and Federal laws applying to the same men and practically the same work under the same employer, as in the case of brickyard laborers, or from the inevitable confusion of jurisdiction which would arise in determining whether a longshoreman at a particular moment was or was not within the admiralty jurisdiction.

There is a strong precedent for leaving to the States the control of those questions which touch maritime jurisdiction in respect to which a uniform rule is not, in the judgment of Congress, desirable. By the act of August 7, 1789 (R. S. 4235), Congress expressly provided that all pilots should be regulated "in conformity with the existing laws of the States, respectively, wherein such pilots may be, or in such laws which the State may, respectively, enact for such purpose." Laws of the States regulating the contract of pilotage, the charge to be made by pilots, the conditions under which pilots must be accepted, have been frequently applied in the courts of the United States without opposition on the ground that these laws materially interfered with the unity of the maritime jurisdiction, although there has never been a doubt that suits for pilotage were within the admiralty and maritime jurisdiction of the United States. "The service is strictly maritime." (*Hobart v. Drogan*, 10 Peters, 108, p. 120.)

In the case of *Cooley v. Board of Wardens* (12 Howard, 299) the statute was upheld as a reasonable rule committing to the legislatures of the States a subject "imperatively demanding that diversity which alone can meet the local situation."

The opinion in the different communities as to what compensation should be provided for local workmen varies greatly. To endeavor to impose by act of Congress in the different communities a uniform rule which would suit the needs as locally understood of no one of the communities and which would apply to a group of local workmen in no essential different from other local workmen, would only tend to create new clashes between workmen and employers or insurance carriers, to confuse a subject, workmen's compensation, in which clarity is most essential, and to depart from the wise rule of leaving local matters to be disposed of by local authorities where a general national interest is not involved.

As in the case of the State quarantine laws, this matter is one in which "the rules that govern may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities." (*Morgan's R. R. & S. S. Co. v. Louisiana*, 118 U. S., 455, p. 466.)

Compensation should be the only remedy as between employer and employee for work accidents. This is an added reason for the passage of this bill. If Congress attempts by a general statute to provide compensation for these workers both on and off the ship,

their right to recover damages for a tort against their employer in the State court would still remain. Congress can not abolish it, and even did the State legislatures desire to grave constitutional difficulties would arise. In several important States, including New York, Pennsylvania, and Ohio, the legislatures are by their constitutions prohibited from limiting the recovery of damages in case of death, and in New York and other States the right of action in such cases can not be abrogated. Complete protection to the employer under a Federal compensation statute would not be possible.

Congress can, however, regulate the jurisdiction of the Federal courts. If this bill is passed the jurisdiction of the district courts over cases of maritime torts in the course of their employment to longshoremen and repairmen ceases, so that the employer who has complied with the State compensation law is fully protected.

FILE COPY



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 684.

INDUSTRIAL ACCIDENT COMMISSION  
OF THE STATE OF CALIFORNIA AND  
JOSEPH HAYES, THOMAS HAYES,  
HELEN HAYES AND MARY HAYES,  
MINORS, BY MARY LORDAN, GUARDIAN OF  
THEIR PERSONS AND ESTATES,

*Plaintiffs in Error,*

vs.

JAMES ROLPH COMPANY AND GEN-  
ERAL ACCIDENT, FIRE AND LIFE  
ASSURANCE CORPORATION, LIM-  
ITED, A CORPORATION,

*Defendant in Error.*

## PETITION FOR A REHEARING

WARREN H. PILLSBURY,  
129 State Building, Civic Center,  
San Francisco, California,  
*Counsel for Plaintiffs in Error.*



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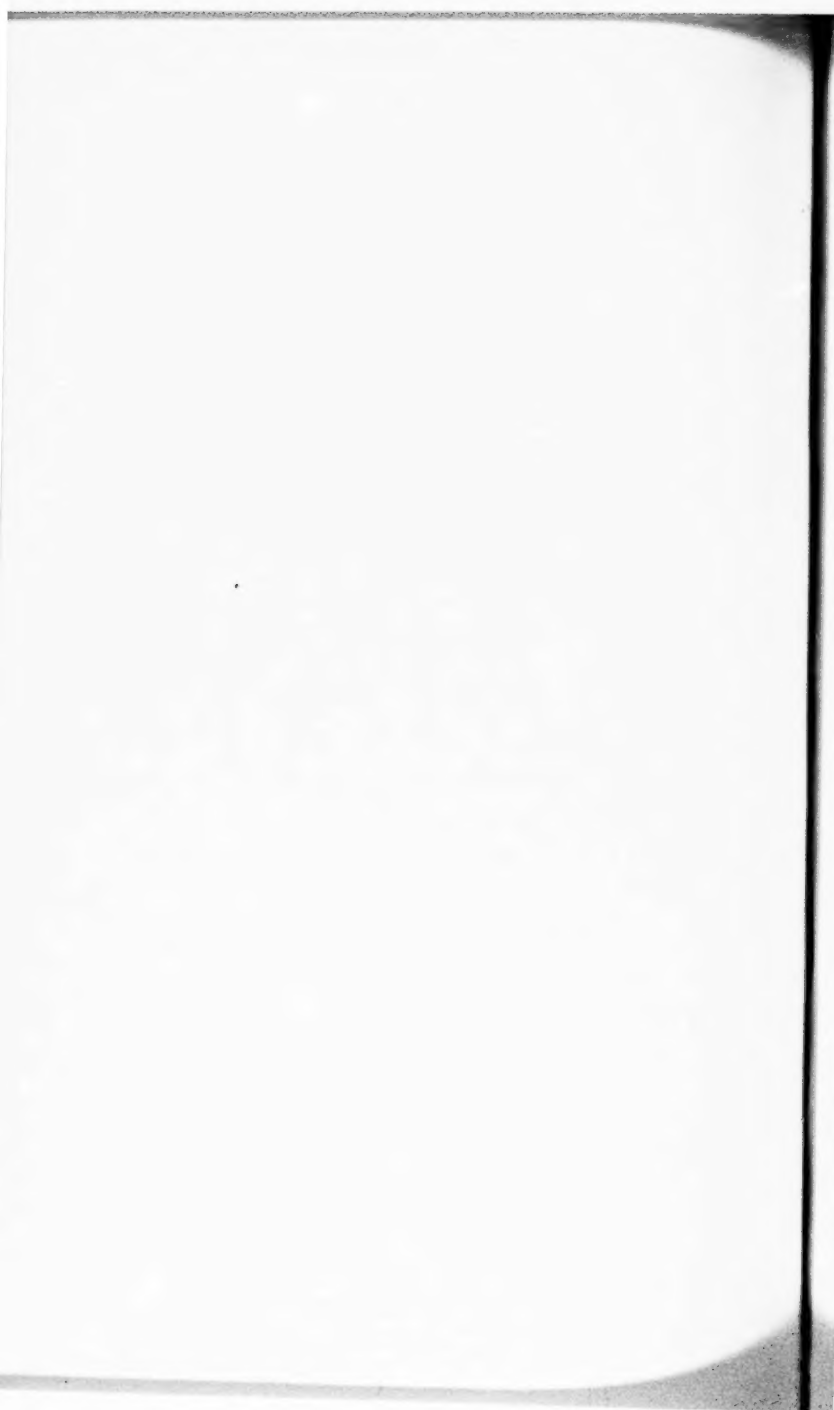
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IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1923.

No. 684.

INDUSTRIAL ACCIDENT COMMISSION  
OF THE STATE OF CALIFORNIA AND  
JOSEPH HAYES, THOMAS HAYES,  
HELEN HAYES AND MARY HAYES,  
MINORS, BY MARY LORDAN, GUARDIAN OF  
THEIR PERSONS AND ESTATES,

*Plaintiffs in Error,*

VS.

JAMES ROLPH COMPANY AND GEN-  
ERAL ACCIDENT, FIRE AND LIFE  
ASSURANCE CORPORATION, LIM-  
ITED, A CORPORATION,

*Defendant in Error.*

**PETITION FOR A REHEARING.**

Plaintiffs in error respectfully pray for a rehearing of the decision of this court made in the above entitled proceeding on February 25 of the present term, upon the ground that the court failed to pass

upon two important assignments of error necessary to decision in the case.

This case was argued as a companion case to No. 366, *State of Washington vs. Dawson*, which latter case involved only the issue dealt with in the opinion of the court written for the two cases jointly. It may be that the opinion was prepared for the latter case and that the court overlooked the fact that the present case contained two additional questions not there raised. These additional issues were briefed by the writer and also stressed upon oral argument.

Both cases dealt with the applicability of state workmen's compensation acts to port, harbor and other local maritime workers. In each case the applicability of the state law was asserted under the act of congress of June 10, 1922, amending sections 24 and 256 of the Judicial Code, which act was by a majority of this court held unconstitutional in its decision herein. We defer to the apparently fixed determination of the court upon the invalidity of the act of congress and do not urge this contention again.

The two assignments of error involved in the instant case not present in the *Dawson* case are:

(1) That a state workmen's compensation act can be applied in all cases of fatal injury (of which the present is one) for the reason that the maritime law makes no provision for fatal injuries. There is, therefore, no provision of the maritime law with which a state workmen's compensation act can come in conflict.

(2) The California Workmen's Compensation Act may be applied in the instant case as an elective workmen's compensation act, accepted by the voluntary contract of the parties, even though not applicable as a compulsory statute.

We especially urge the court to pass upon the latter contention. The highest courts of six states have sustained the application of elective state workmen's compensation acts to maritime injuries. But one, the court below in the present case, has denied it. The affirmance of the decision below without discussion of this ground unsettles the law of all the maritime states possessing elective, or compulsory and elective, compensation statutes and creates confusion. The effect is seriously to embarrass the determination of claims arising from personal injuries sustained by harbor workers in all such states.

The present state of the law governing injuries sustained by stevedores, repairmen, drydock workers and other port and harbor workers is that their rights are governed by the rule of *The Osceola*, 189 U. S. 158, a rule which was never intended for port workers, but was created solely to fit the needs of seamen and those who travel with vessels from port to port and country to country. The rule is wholly inapplicable by nature to resident workers and is incomparably inferior in its protection and natural justice to the modern and more humane legislation prevailing in most maritime states. It also places both such workers and their industries at a disad-

vantage as compared to all other industrial workers in the same ports.

Realizing the insufficiency of the rule of *The Osceola* to meet modern conditions, Congress, by section 33 of the Merchant Marine Act of 1920 (the validity of which has just been sustained by this court in *Panama R. R. Co. vs. Andrew Johnson*, decided April 7, 1924), has relieved seamen from the maritime rule by giving them the option of recovery under the Federal Employers' Liability Act. This relief does not extend to longshoremen or other port workers. We now have the anomaly that seamen, for whom alone the rule of *The Osceola* was designed, are relieved from it while stevedores, repairmen and other port workers to whom it is logically inapplicable have been forced under it by certain court decisions with no relief until congress acts, unless relief can be obtained by their own voluntary agreement.

In California and many other maritime states, employers and employees in maritime work have endeavored to obviate this result by voluntarily adopting the state workmen's compensation acts as the measure of their rights and liabilities. This is particularly desirable because such workers are now subject to the state law for all injuries occurring *upon land* in the course of their maritime employment; *State Industrial Commission of New York vs. Nordenholt Corporation*, 259 U. S. 263. It is a convenient step to extend the same law to cover the whole employment. This voluntary adoption of the state

law has been sanctioned, as stated, by the highest courts of six states, the cases being cited in the footnote.<sup>1</sup> We believe it to be expressly sanctioned by the decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469. We respectfully submit that this court should end the uncertainty created upon this subject by its decision in the instant case, by granting a rehearing and definitely determining the question.

The facts of the present case are that one Eugene Hayes, a longshoreman, was killed on September 5, 1922, while assisting in unloading a vessel in San Francisco harbor, the injury occurring upon the vessel. A death benefit was granted his minor children by the California Industrial Accident Commission under the State Workmen's Compensation Act. The defense of conflict with the maritime law was overruled upon the grounds (1) that the act of congress of June 10, 1922, saved the case; (2) the case being one of fatal injuries, for which the maritime law has no provision, no conflict exists with the maritime law; (3) the state statute should be applied as an elective act. This decision was reversed by the Supreme Court of California upon all three grounds, which decision was sustained by this court upon the first ground only.

<sup>1</sup> *Berey vs. Donovan & Sons*, 120 Me. 457, 115 Atl. 250; *Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372; *Bockhop vs. Phoenix Transit Co.* (N. J.), 117 Atl. 624; *Southern Surety Co. vs. Stubbs* (Tex.), 139 S. W. 343; *Travelers Insurance Co. vs. Bacon* (Ga.), 119 S. E. 458; *West vs. Kozier* (Ore.), 206 Pac. 542.

## ARGUMENT.

We here summarize briefly the argument made in the writer's brief upon each of the two last contentions.

### I.

**THE MARITIME LAW CREATES NO RIGHT OF ACTION FOR DEATH. THE STATE IS, THEREFORE, FREE TO PROVIDE THE SUBSTANTIVE LAW WHICH SHALL GOVERN FATAL MARITIME INJURIES, WHETHER THAT LAW BE IN THE NATURE OF A LORD CAMPBELL'S ACT OR A WORKMEN'S COMPENSATION ACT.**

This contention is raised in our second assignment of error (rec. page 26). It was stated more narrowly in plaintiff in error's brief, page 61, and was restated at the oral argument in its broadest scope. It is not raised for the first time in this petition.

All the decisions of this court upon the subject concede that the maritime law has never provided a remedy for fatal injuries occurring upon navigable waters of the United States.

*American Steamboat Co. vs. Chace*, 16 Wallace, 522;

*The Harrisburg*, 119 U. S. 199;

*The Corsair*, 145 U. S. 335.

As a result this court has repeatedly sanctioned the application of state death statutes (Lord Campbell's Acts) to maritime injuries.

*Southern Pacific Co. vs. Jensen*, 244 U. S. 205;

*Western Fuel Co. vs. Garcia*, 257 U. S. 233.



If a state statute creating a right of action for tortious death be valid, why may not a state statute creating a right of action upon workmen's compensation principles for the same death be equally valid? The constitution does not fix any doctrine of substantive law to be applied in the maritime field. It merely confers jurisdiction.

*Panama R. R. Co. vs. Johnson, supra*, decided April 7, 1924, by this court.

The question of what the substantive law shall be is therefore a legislative and not a constitutional question. Given a power in the states to make applicable their state death statutes, it would seem that the states would have equal power to apply their more modern workmen's compensation legislation under the same circumstances. The common law rule of indemnity is no more sacred than modern statutory reforms now adopted by forty-two of our forty-eight states.

The similarity or lack of similarity of the state rule to principles of maritime law is immaterial. In its decision in *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, in the instant case, decided February 25, 1924, and in *Panama R. R. Co. vs. Johnson*, decided April 7, 1924, this court reaffirms the power of congress to supplant the characteristic rules of the maritime law with different rules drawn from other systems, expressly including a workmen's compensation act. To the extent that the states can make any rule applicable, the same

choice of principles would inevitably follow. Moreover, the underlying principle of compensation legislation is closer in nature to the rule of *The Osceola* than that of indemnity for tort, as both are based upon a limited insurance, irrespective of fault, and not upon tort.

*The Osceola*, 189 U. S. 158;

*New York Central R. R. Co. vs. White*, 243 U. S. 188;

Constitution of California, Art. XX, Sec. 21.

We do not pass over the fact that *Southern Pacific Co. vs Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, were both cases of fatal injuries and in both the State Compensation Act was held inapplicable. In neither did the court explain why the state law could not be applied to death cases. The only explanation the writer has ever seen suggested is that it was the intention of the court to hold that the states can not interfere with the movement of commerce in interstate and foreign transportation by water by making a rule of their own applicable to injuries sustained by persons engaged in such transportation. This notwithstanding the fact that similar interference with interstate and foreign commerce by rail by the states has received the approval of this court. *Second Employers' Liability* cases, 223 U. S. 1; *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co. vs. Western Maryland R. R. Co.*, 242 U. S. 311. This interpretation of

the *Jensen* and *Knickerbocker* cases is supported by the language of the opinions therein.

This court has, however, later modified the *Jensen* and *Knickerbocker* cases and changed the ground of its decision from *interference with commerce to conflict with applicable rules of the maritime law; State Industrial Commission of N. Y. vs. Nordenholt Corporation*, 259 U. S. 263, and the instant case. In the *Nordenholt* case, this court stated:

“Consequently, when the compensation act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law.”

In *Grant Smith-Porter Ship Co. vs. Rohde, supra*, this court said:

“Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law can not materially affect any rules of the sea whose uniformity is essential.”

In *Panama R. R. Co. vs. Johnson, supra*, this court said:

“As there could be no cases of ‘admiralty and maritime jurisdiction’ in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character.”

In the *Nordenholt* case a stevedore was injured upon the dock while performing maritime service. The court held the State Compensation Act appli-

cable because it did not conflict with maritime law in such case, notwithstanding the fact that the interference with commerce by the state law was just as great where the injury occurred on the dock as where it occurred on the vessel in the course of the same stevedoring service.

The basis of exclusion of state workmen's compensation acts as now stated in the decisions of this court is that such acts are excluded only where they come in conflict with an applicable rule of the maritime law. There being no such rule in death cases, there is no conflict.

## II.

### **THE STATE COMPENSATION ACT MAY BE APPLIED IN THE PRESENT CASE AS AN ELECTIVE ACT.**

As stated above, the advantage of uniformity of regulation of port and harbor employments, by which the same law may be made applicable whether the injury occurs upon the vessel or upon the wharf, has led port and harbor industries generally to adopt the state acts as the measure of their rights and duties by voluntary contracts with their workmen to this effect, such voluntary contracts being the basis of all elective compensation acts. Further elements of public policy inducing port and harbor industries to seek this course are strikingly set out in the *amicus curiae* brief filed in this proceeding on behalf of American Ship Builders, Inc., New York, and New Jersey Dry Dock Association and Longshoremen's Union of America. The desire of ship builders is there pointed out to have their workmen under the same law when making repairs upon old ships tied up at their docks as when engaged in new ship construction; of brick yards and other local manufacturers who load and unload barges with their own men, to have them under one law throughout; of dry dock owners to be under one law for their whole service; or lumber and coal dealers to be under one law for the entire service performed by their men in unloading and distributing coal, etc. Attention is also called to appendices "A" and "B" of said brief, containing reports of the senate and house committees, reporting the bill

which later became the act of congress of June 10, 1922, which are equally important in showing the strong public policy of permitting voluntary election of state workmen's compensation acts by employers and employees in local maritime work.

An elective workmen's compensation act is one which is made applicable to the situation of the parties by their voluntary choice or adoption of the statute in place of the earlier law, which choice is manifested in one or more of the modes prescribed in the statute. It is a species of implied contract. The constitutionality and effectiveness of such elective acts have been sustained universally by the state courts and have been upheld by this court in *Jeffrey Mfg. Co. vs. Blagg*, 235 U. S. 571; *Hawkins vs. Bleakly*, 243 U. S. 210; *Middleton vs. Texas Power & Light Co.*, 249 U. S. 152.

The validity of election of state workmen's compensation act to cover maritime injuries has been sustained in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469; *Berry vs. Donovan & Sons*, 120 Me. 457, 115 Atl. 250; *Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372; *Bockhop vs. Phoenix Transit Co.* (N. J.), 117 Atl. 624; *Southern Surety Co. vs. Stubbs* (Tex.), 199 S. W. 343; *Travelers Insurance Co. vs. Bacon* (Ga.), 119 S. E. 458; *West vs. Kozier* (Ore.), 206 Pac. 542.

The parties to a maritime contract may in general specify in their contract the law which shall determine their rights and liabilities under it. *Grant*

*Smith-Porter Ship Co. vs. Rohde*, *supra*; *Union Fish Co. vs. Erickson*, 248 U. S. 308, 313; *Watts vs. Camors*, 115 U. S. 353, 362.

This is but an expression of general law.

“As construed by the court, this section is the recognition of a principle of universal law; the principle that in every *forum* a contract is governed by the law with a view to which it was made.” Mr. Chief Justice Marshall in *Wayman vs. Southard*, 10 Wheat. 1, 48.

Also to the same effect:

“Where the parties have expressly provided that the contract shall be governed by the law of a particular country, this intention will as a rule be carried out by the courts, and a party is bound by his choice. ‘Parties may substitute the laws of another place or country, than that where the contract is entered into, both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms.’ This is part of the *jus gentium*, and is enforced *ex comitate*, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of the contract.” 13 Corpus Juris, p. 251.

A right to benefits under an elective workmen’s compensation act is contractual and a suit to enforce such benefits is a suit upon contract.

*Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372;

*Berry vs. Donovan & Sons*, 120 Me. 457, 115 Atl. 250;

*Hunter vs. Colfax Consolidated Coal Co.* (Minn.), 154 N. W. 1037, 157 N. W. 145;

*Pierce vs. Bekins Van & Storage Co.*, 185 Iowa 1346, 172 N. W. 191;

*Grinnell vs. Wilkinson*, 39 R. I. 447, 98 Atl. 103;

*Crane vs. Leonard* (Mich.), 183 N. W. 204;

*Post vs. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351.

Therefore suit to enforce such elective compensation act in maritime cases may be brought in the state tribunals, at least concurrently with the federal courts, under the original "saving clause" as adopted in 1789 (Secs. 24 and 256, Judicial Code, as originally enacted).

*Kennerson vs. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372;

*Southern Surety Co. vs. Stubbs* (Tex.), 199 S. W. 343;

*Berry vs. Donovan & Sons*, 120 Me. 457, 115 Atl. 250.

In the *Kennerson* case, it is said:

"The contract in question (*i. e.*, of employment) may be assumed to be a maritime one. That would give the admiralty court the right to take jurisdiction over it. It could not take from our courts jurisdiction over a contract made in Connecticut by citizens of Connecticut, nor prevent its enforcement wherever it is operative by the procedure of the state of its origin. This contract is to be interpreted and enforced by the



application of the same principles accorded any contract. \* \* \* Plainly this proceeding is a personal action, and not one *in rem*. The admiralty court has not exclusive jurisdiction. *Knapp, Stone and Co. vs. McCaffrey*, 177 U. S. 638, 643; *Schoonmaker vs. Gilmore*, 102 U. S. 118; *Leon vs. Galceran*, 11 Wall. 185; *The Belfast*, 7 Wall. 624; *The Hine vs. Trevor*, 4 Wall. 555, 567, 568; *Manchester vs. Massachusetts*, 139 U. S. 240."

The decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, *supra*, was also taken by the lower court to imply this result, as a subsequent suit by Rohde under the Oregon Compensation Act was held within the jurisdiction of the Oregon Industrial Commission in *Rohde vs. State Industrial Accident Commission*, 217 Pac. 627.

The two acts of congress pronounced unconstitutional in *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, and in the instant case (act of October 6, 1917; act of June 10, 1922), each amending sections 24 and 256, Judicial Code, also retain sufficient effectiveness to sanction a concurrent jurisdiction in the state tribunals to enforce an elective compensation act concurrently with the federal courts, where the state act may constitutionally prescribe the substantive law of the case.

The only substantial contention made by defendants in error in opposition to our position is one relating to the mode of election prescribed by the California act and its application to the facts of the case at bar. The California act is compulsory as to

most industrial occupations and elective as to all others (section 70, California Compensation Act), which necessarily includes maritime employments, as they are not within the compulsory features. *Southern Pacific Co. vs. Jensen*, 244 U. S. 205. The provisions of the California act, fixing the mode for accepting its provisions as an elective statute, are printed in the footnote.

The alternative method emphasized in the italicized portions of the section is the one followed in the present case. Defendant in error James Rolph Company, the employer, procured from defendant in error General Accident, Fire and Life Assurance Corporation, Limited, the insurer, a policy of workmen's compensation insurance covering all its employees and specifically including its stevedoring operations without any exclusion of injuries occurring upon water. The policy covered the work per-

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SEC. 70. (a) Any employer, having in his employment any employee not included within the term "employee" as defined by section eight of this act or not entitled to compensation under this act, and any such employee, may, by their joint election, elect to come under the compensation provisions of this act in the manner hereinafter provided.

(b) Such election on the part of the employer shall be made by filing with the commission a written statement to the effect that he accepts the compensation provisions of this act, which, when filed, shall operate, within the meaning of section six of this act, to subject him to the compensation provisions thereof, and of all acts amendatory thereof, for the term of one year from the date of filing, and thereafter without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or succeeding year, file in the office of the commission a notice in writing that he withdraws his election. Such acceptance shall be held to include employees whose employment is both casual and not in the course of the trade, business, profession or occupation of the employer, unless expressly excluded therefrom. *In case any employer is insured against liability for compensation under this act, he shall be deemed to have so elected during the period that such policy shall remain in force, without filing such written notice with the commission, as to all classes of employees covered by such policy of insurance, anything in this act to the contrary notwithstanding.*

(c) Any employee in the service of any employer who has made an election in either of the modes above prescribed, shall be deemed to have

formed by the deceased employee, Hayes, at the time of his injury and was in full force and effect at said time. (See stipulation of defendants in error, page 89 of the record, third paragraph from the bottom of the page.) Defendants in error have therefore carried out the mode of election prescribed in the italicized portion of the section.

Defendants in error claim that the policy of insurance in question contained a separate provision insuring the employer against liability under the general law, including maritime law, and that the policy and state statute should therefore be construed to hold that the compensation insurance applied only to injuries occurring upon the land and the insurance under the maritime law to injuries occurring upon the vessel. We did not fully answer

accepted, and shall, within the meaning of section six of this act, be subject to the compensation provisions of this act, and of any act amendatory thereof, if, at the time of the injury for which liability is claimed:

(1) The employer charged with such liability is subject to the compensation provisions of this act, whether the employee has actual notice thereof or not; and

(2) Such employee shall not, at the time of entering into the employment, have given to his employer notice in writing that he elects not to be subject to the compensation provisions of this act; or, in the event that such employment was entered into in advance of the election by the employer, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices shall have remained in the service of such employer for five days after the employer has filed his election, in which case the time at which the employee becomes subject to said compensation provisions shall be deemed to be at the beginning of said period.

(d) The state, and all political or other subdivisions thereof, as defined in section seven, and all state institutions, shall be conclusively presumed to have elected to come within the provisions of this act as to all employments otherwise excluded from this act.

(e) All written acceptances filed by employers with the commission prior to the taking effect of this act, accepting the provisions of the workmen's compensation, insurance and safety act, chapter one hundred seventy-six, statutes of 1913, and all acts amendatory thereof, shall, unless written notice be given to the contrary by said employer within sixty days after the taking effect of this act, be deemed acceptances of the provisions of this act, and all acts amendatory thereof, in accordance with the provisions of this section.

this contention in our brief to this court because we believed and still believe that it involves only a question of construction of evidence and construction of the state statute, on which the determination of the highest court of the state is accepted by this court. The Supreme Court of California did not pass upon this contention directly for the reason indicated in the following excerpt from its opinion (quoted from page 13 of the record):

“At the time this petition was filed, there was pending in this court two proceedings in *certiorari* which have since been decided, and which dispose of the issues raised by this petition and the four answering contentions of the respondent just stated. (*Alaska Packers Association vs. I. A. C. and J. Hansen*, 66 Cal. Dec. 273, and *Zurich General Accident, etc. Co. vs. I. A. C. and Jenny A. Denny*, 66 Cal. Dec. 277.) Because time for a rehearing had not elapsed when the (fol. 33) respondent commission filed its answer in this matter, it reasserted its contentions one and two referred to. \* \* \* We are satisfied with the conclusions reached and announced in the *Alaska Packers* case and in the *Zurich* case, *supra*. They satisfactorily dispose of the contentions thus far noted in this proceeding.”

In the *Zurich* case referred to in the excerpt, however, the California Supreme Court said upon this contention:

“Assuming that the act of taking out such a policy of insurance ordinarily may have the effect of bringing the employer under the work-

men's compensation provisions of this act, as provided, it can not of itself confer jurisdiction upon the commission, where, as in this case, exclusive jurisdiction of the matter in controversy is vested in the admiralty courts."

*Zurich etc. Co. vs. Industrial Accident Commission of California*, 218 Pac. 563.

The lower court, therefore, decided that the insurance policy fully met the requirements of section 70 of the California statute for an election, at least for the purpose of this decision. This court will therefore probably limit this consideration to the federal question of whether the constitution and maritime law forbid the application of an elective statute to a maritime employment. The Supreme Court of California, upon receiving the guidance of this court upon this question, can then construe the state statute and insurance policy further if it is so required.

If, however, this court desires to itself construe the policy and state statute, we respectfully submit the following considerations:

(1) The insurance policy, set out on pages 18 to 22 of the record, nowhere apportions liability for injuries occurring upon land to the compensation act and those occurring upon water to the special endorsement. Each form of insurance is coextensive with the entire scope of the policy as its application may appear. To illustrate: If the act of congress of June 10, 1922, had been pronounced valid instead of void in the instant case, the workmen's compensation portion of the policy would have

covered the employer's loss, under the stipulation quoted in the next paragraph.

(2) The claimed construction is inconsistent with the stipulation by the defendants in error before the State Industrial Accident Commission, which reads as follows (rec. p. 8):

“(2) That at the said time the General Accident and Life Insurance Company, was the insurance carrier for the defendant employer and is liable for any compensation herein awarded.”

(3) The California statute, as appears from the language of section 70 quoted in the footnote, does not exempt so-called “double coverage” policies, such as the one involved in this case, from the legal effect of an election. It pronounces every policy insuring against liability under the Workmen's Compensation Act an election to the extent of the scope of the compensation policy of other insurance protection given therein.

*Erie R. R. Co. vs. Winfield*, 244 U. S. 170, should be mentioned, but is clearly distinguishable. In this case, the Erie Railroad Company was held not to have elected to come under the New York Compensation Act to the exclusion of the Federal Employers' Liability Act, under a provision of the state law by which failure to disaffirm the state law was conclusively presumed to be an election. Naturally, the state can not force the holder of a federal privilege to a disaffirmance. This does not imply, however, that the holder of the federal privilege may not voluntarily and expressly contract, or what is

the same thing, voluntarily and expressly do the act pronounced an affirmative election by the state law, and thereby come under its provisions. In the present case, the employer, knowing the law as it must be presumed to do, took out a policy of workmen's compensation insurance upon its entire stevedoring operation on land and water. The insurer knowingly issued such a policy. The policy could have no meaning as to insurance of injuries occurring upon the water except as an election under the state law. This law is expressly incorporated in the policy as part of the terms thereof (rec. pages 18-19). It does not lie in the mouths of the defendants in error to claim that their act does not have the legal effect given it by the terms of their own contract.

Wherefore plaintiffs in error respectfully pray this court to grant a rehearing of its decision entered in this matter February 25 of the present term, and proceed to pass upon the two issues stated above, and thereafter to hold that the State Workmen's Compensation Act is applicable under the facts of the present case, both because of the fact that this proceeding involves a fatal injury and because the state statute is applicable as an elective statute, and to reverse the decision of the court below upon said issues.

Respectfully submitted.

WARREN H. PILLSBURY,  
*Counsel for Plaintiffs in Error  
and Petitioners herein.*

IN THE  
**SUPREME COURT**  
OF THE  
**United States**

No. 366.

22

OCTOBER TERM, 1923.

THE STATE OF WASHINGTON,  
*Plaintiff in Error,*  
v.  
W. C. DAWSON & COMPANY, a corpora-  
tion, *Defendant in Error.*

WRIT OF ERROR TO THE SUPREME COURT  
OF THE STATE OF WASHINGTON.

**MOTION TO ADVANCE**

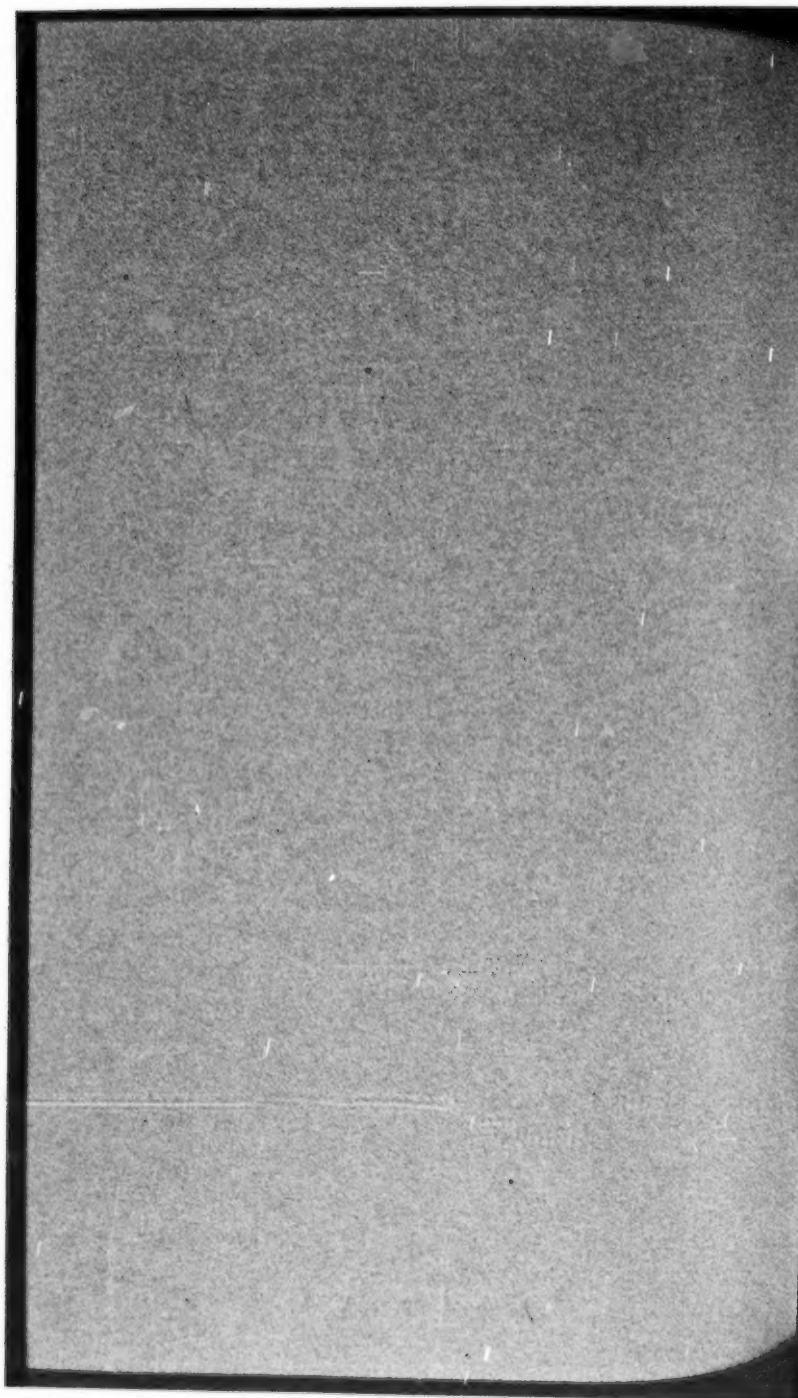
THE STATE OF WASHINGTON,  
JOHN H. DUNBAR,  
*Attorney General.*

RAYMOND W. CLIFFORD,  
*Assistant Attorney General.*  
*Attorneys for Plaintiff in Error.*

GUIE & HALVERSTADT,  
*Of Counsel.*

Office and Postoffice Address:  
Temple of Justice, Olympia, Wash.





IN THE  
SUPREME COURT  
OF THE  
United States

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No. 366.

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OCTOBER TERM, 1923.

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THE STATE OF WASHINGTON,	}
<i>Plaintiff in Error,</i>	
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tion,	
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WRIT OF ERROR TO THE SUPREME COURT  
OF THE STATE OF WASHINGTON.

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MOTION TO ADVANCE

---

THE STATE OF WASHINGTON,  
JOHN H. DUNBAR,  
*Attorney General.*

RAYMOND W. CLIFFORD,  
*Assistant Attorney General.*

*Attorneys for Plaintiff in Error.*

GUIE & HALVERSTADT,  
*Of Counsel.*

Office and Postoffice Address:  
Temple of Justice, Olympia, Wash.

# PLANTING

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IN THE  
**SUPREME COURT**  
OF THE  
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OCTOBER TERM, 1923.

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THE STATE OF WASHINGTON,	}
<i>Plaintiff in Error,</i>	
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<i>Defendant in Error.</i>	

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WRIT OF ERROR TO THE SUPREME COURT  
OF THE STATE OF WASHINGTON.

---

**MOTION TO ADVANCE**

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The plaintiff in error, The State of Washington, moves that this case be advanced for hearing upon the October Term, 1923, of the Supreme Court of the United States, for the following reasons:

This action was instituted by The State of Washington for the purpose of collecting premiums upon the payroll of stevedores employed by W. C.

Dawson & Company, a corporation. Stevedores were expressly placed under the provisions of the workmen's compensation acts of the several states by virtue of the amendments to clause 3, of sections 24 and 256 of the Judicial Code, which was passed on June 10, 1922, 42 Stat. 634, which reads as follows:

"The district courts shall have original jurisdiction as follows:

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive: of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States."

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States."

The supreme court of the state of Washington held that this statute was unconstitutional and this writ of error was taken to the Supreme Court of the United States from this decision, and the only question involved in this case is the constitutionality of the statute quoted *supra*. Approximately 250 claims have been filed with the Department of Labor and Industries of the State of Washington by stevedores who have been injured while engaged in their occupations, and included therein are about seven or eight death claims. It is obvious that the constitutionality of this statute can never be definitely ascertained until a ruling is secured on this question from the Supreme Court of the United States. For this reason the claims filed with the Department of Labor and Industries have neither been rejected nor allowed, but held in suspension pending this appeal. This leaves the whole matter of the rights of stevedores to compensation for injuries in a chaotic condition, as the stevedores do not know whether their proper remedy is an action against the employer in the Federal courts, or whether they are entitled to compensation under the workmen's compensation act. It also makes it extremely difficult to administer the workmen's compensation act of this state, as the Department of Labor and Industries is not in a position to either allow or reject such claims until the constitutionality of this statute is finally determined. It is therefore contended that this is a matter impressed with a public interest, and that the public

welfare demands a speedy determination of this question.

What is said herein concerning the state of affairs existing in the State of Washington is also, no doubt, true in every state in the Union which has a workmen's compensation act, and which has navigable waters within its boundaries. We are not advised whether or not there are any other appeals pending in the Supreme Court of the United States involving this precise question. This question was decided in the case of *Farrell v. Waterman S. S. Co.*, 286 Fed. 284, but we have no information as to whether or not this case has been appealed.

Plaintiff in error therefore respectfully urges that this motion be granted.

The State of Washington  
 John H. Dunbar  
 Attorney General  
 Raymond W. Clifford  
 Asst. Atty. General  
 Attorney for Plaintiff in  
 Error

Yusef Halverstad  
 Of Counsel

# In the Supreme Court of the United States

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No. 366.

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OCTOBER TERM, 1923.

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THE STATE OF WASHINGTON,	}
<i>Plaintiff in Error,</i>	
v.	
W. C. DAWSON & COMPANY, a corpora- tion, <i>Defendant in Error.</i>	

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PLEASE TAKE NOTICE that on Monday, October 1, 1923, at 12:00 o'clock, noon, or as soon thereafter as counsel may be heard, The State of Washington, plaintiff in error, will submit to the Supreme Court of the United States, a motion, a copy of which is attached hereto, petitioning said Court to advance the above entitled cause for hearing.

Dated September 1, 1923.

THE STATE OF WASHINGTON,  
JOHN H. DUNBAR,  
*Attorney General.*

RAYMOND W. CLIFFORD,  
*Assistant Attorney General.*

*Attorneys for Plaintiff in Error.*

GUIE & HALVERSTADT,  
*Of Counsel.*

To:  
Cosgrove & Terhune,  
Attorneys for Defendant in Error,  
Seattle, Washington.



# In the Supreme Court of the United States

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No. 366.

---

OCTOBER TERM, 1923.

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THE STATE OF WASHINGTON,	}
<i>Plaintiff in Error,</i>	
v.	
W. C. DAWSON & COMPANY, a corpora- tion,	<i>Defendant in Error.</i>

---

Consent is hereby given to the advancement of  
this case for hearing on the October Term, 1923, of  
the Supreme Court of the United States.

Dated September 1, 1923.

*Cosgrove & Terhune*  
*Attorneys for Defendant in Error.*

United States

No. 806

OCTOBER TERM, 1922.

THE STATE OF WASHINGTON,

*Plaintiff in Error,*

v.

W. C. Dawson & Company, a corporation,

*Defendant in Error.*

WRIT OF ERROR TO THE SUPREME COURT  
OF THE STATE OF WASHINGTON

BRIEF OF PLAINTIFF IN ERROR

THE STATE OF WASHINGTON,

JOHN H. DUNBAR,

*Attorney General,*

RAYMOND W. CLIFFORD,

*Assistant Attorney General,*

*Attorneys for Plaintiff in Error.*

GUIDE & HALVERSTADT,

*Of Counsel.*

Office and Postoffice Address:

Temple of Justice, Olympia, Wash.

IN THE  
**SUPREME COURT**  
OF THE  
**United States**

No. \_\_\_\_\_

OCTOBER TERM, 1923.

THE STATE OF WASHINGTON,	}
<i>Plaintiff in Error,</i>	
v.	
W. C. DAWSON & COMPANY, a corporation,	}
<i>Defendant in Error.</i>	

WRIT OF ERROR TO THE SUPREME COURT  
OF THE STATE OF WASHINGTON

**BRIEF OF PLAINTIFF IN ERROR**

THE STATE OF WASHINGTON,  
JOHN H. DUNBAR;  
*Attorney General.*

RAYMOND W. CLIFFORD,  
*Assistant Attorney General.*

*Attorneys for Plaintiff in Error.*

GUIE & HALVERSTADT,  
*Of Counsel.*

Office and Postoffice Address:  
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IN THE  
**SUPREME COURT**  
OF THE  
**United States**

No. \_\_\_\_\_

OCTOBER TERM, 1923.

THE STATE OF WASHINGTON,	}
<i>Plaintiff in Error,</i>	
v.	
W. C. DAWSON & COMPANY, a corporation,	}
<i>Defendant in Error.</i>	

WRIT OF ERROR TO THE SUPREME COURT  
OF THE STATE OF WASHINGTON

**BRIEF OF PLAINTIFF IN ERROR**

STATEMENT.

Plaintiff in error instituted this action against the defendant in error for the purpose of collecting industrial insurance premiums by virtue of section 7676, Rem. Comp. Stat., which reads, in part, as follows:

“Insomuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay-roll for that year \* \* \*”

Then follows a schedule showing the percentage that each different industry should pay in accordance with the degree of award in such industries.

It is alleged in the complaint that the defendant in error employs workmen known as stevedores, whose work consists of stowing away the cargo in ships lying upon the waters of Puget Sound, which are navigable waters within the boundaries of the state of Washington. A demurrer was interposed to the complaint, which was sustained by the trial court. Plaintiff in error refused to plead further, and an order of dismissal was entered. An appeal was taken from this order of dismissal to the supreme court of the state of Washington, and on December 20, 1922, (Vol. 22, No. 8, p. 355, Wash. Dec.) the judgment of the lower court was affirmed. A petition for a rehearing was filed by the plaintiff in error, and granted by the supreme court of the state of Washington, and the cause was reheard *en banc* by the supreme court of the state of Washington, which resulted in the original decision of the supreme court of this case being adhered to and a judgment was entered in conformity with such opinion. This writ of error was then sued out to the supreme court of the state of Washington.



## ASSIGNMENTS OF ERROR.

### I.

The court erred in directing the sustaining of the demurrer of defendant in error in the supreme court of the state of Washington to the complaint.

### II.

The court erred in entering judgment in said action against the plaintiff in error and dismissing its action.

### III.

The court erred in holding that the plaintiff in error in the supreme court of the state of Washington had no right to collect from an employer engaged in the business of stevedoring a percentage of his pay-roll as premiums by virtue of the workmen's compensation act of the state of Washington, being sections 7673, *et seq.*, Rem. Comp. Stat.

### IV.

The court erred in holding that the amendments to section 24 and section 256 of the Judicial Code, approved by Congress on June 10, 1922, was unconstitutional in that it is repugnant to and in conflict with section 2, Article III, of the Constitution of the United States of America, and therefore of no force and effect.

### V.

The court erred in not reversing the judgment of the superior court of King county of the state of

Washington, and granting to plaintiff in error rights and privileges claimed therein under and by virtue of the amendments to section 24 and section 256 of the Judicial Code, approved by Congress on June 10, 1922.

## ARGUMENT.

1. SECTION 24 AND SECTION 256 OF THE JUDICIAL CODE AS AMENDED BY THE ACT OF CONGRESS OF JUNE 10, 1922, IS CONSTITUTIONAL.

Prior to 1917, clause 3 of sections 24 and 256 of the Judicial Code provided as follows:

“The district courts shall have original jurisdiction as follows:

“Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.”

“Of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it.”

In an effort to give workmen their rights under the workmen's compensation acts of the several states who were excluded therefrom only because the admiralty court had exclusive jurisdiction, sections 24 and 256 were amended by an act of October 6, 1917, ch. 97, 40 Stat. 395, by adding to the saving clause the following:

“And to claimants the rights and remedies under the workmen's compensation law of any state.”

This will hereafter be referred to as the 1917 amendment.

These sections, in so far as they attempted to confer jurisdiction to rights under the workmen's compensation acts of the several states, were declared unconstitutional in the case of *Knickerbocker Ice*

*Co. v. Stewart*, 253 U. S. 149. See also: *Lund v. Griffiths & Sprague Stevedoring Company*, 108 Wash. 220. Another effort was made to allow stevedores the benefits of the workmen's compensation acts of the several states by Congress, which culminated in another amendment to clause 3 of sections 24 and 256 of the Judicial Code, which was passed on June 10, 1922, 42 Stat. 634, and which reads as follows:

"The district courts shall have original jurisdiction as follows:

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive: of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States."

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensa-

tion law of any State, District, Territory, or possession of the United States."

This amendment will hereafter be referred to as the 1922 amendment.

The 1917 amendment was declared unconstitutional in the *Knickerbocker* case, *supra*, because it was there held that Congress had no power to delegate this authority to the state, as it would destroy the harmony and uniformity which the Constitution established in admiralty matters. This is shown by the following excerpt from the *Knickerbocker* case, *supra*, page 164:

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Accident Commission*, 188 Pac. Rep. 803."

It is the position of the defendant in error that the amendment of 1922 did not in any manner correct this evil, and that in fact it unlawfully delegates power to the several states, and that for this reason

the *Knickerbocker* case, *supra*, is still authority for the position that the 1922 amendment is unconstitutional. It will be noted that the only material difference between the two amendments is that the amendment of 1922 divests the district courts of jurisdiction in cases where such injured workmen are included under the provisions of the workmen's compensation acts of the several states. The reason that heretofore states had no power to include stevedores working on ships lying in navigable waters under the provisions of their compensation acts was that the federal courts had exclusive jurisdiction of such cases. The reasoning advanced in the *Knickerbocker* case why Congress had no power to delegate this authority to the states was that it would destroy the uniformity and harmony so essential to admiralty matters. The only issue presented by this case is whether the 1922 amendment, if operative, would in fact destroy the uniformity and harmony in matters relating to admiralty jurisprudence. It is well settled that the state has the right to enact legislation relative to certain local regulations in connection with admiralty matters which do not destroy the uniformity and harmony so essential to admiralty jurisdiction.

In the case of *American Steamboat Co. v. Chace*, 16 Wall. 522, 21 Law Ed. 369, which was a suit at common law for a death in the waters of Rhode Island caused by a marine collision, it appeared that the Rhode Island statute giving a right of action at

common law was held valid notwithstanding the point made by the defense that the cause of action was maritime by nature and that the statute was an infringement of the exclusive admiralty jurisdiction of the federal courts. A similar situation arose in the case of *Sherlock v. Alling*, 93 U. S. 99, 23 Law Ed. 819. The statute giving a cause of action for a death was attacked on the ground that it violated the commerce clause of the Federal Constitution as imposing a new burden on the commerce, but the court held that it affected commerce only indirectly and that in such matters the states could legislate as long as Congress failed to legislate on the subject.

In the case of *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 13 Law Ed. 996, a state statute relative to pilots was under consideration and it was contended that such statutes were invalid as affecting admiralty matters, which were within the exclusive jurisdiction of Congress. The court there held that the pilotage laws are among the state statutes relating to vessels which have been upheld as not in conflict with the clause of the Federal Constitution conferring on Congress the right to regulate interstate and foreign commerce. The principle that the general maritime law may be changed, modified or affected to some extent by state legislation is also recognized in the case of *So. Pac. Co. v. Jensen*, 244 U. S., 205 (216), wherein the court said:

“In view of these constitutional provisions and the Federal act it would be difficult, if not impossible,

to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute. *The Lottawanna*, 21 Wall. 558 \* \* \*

and cases cited.

If the 1917 amendment were operative the district courts would still have jurisdiction of admiralty matters, and the states would have power to collect premiums from employers of stevedores and would be unable to give such employers any protection by reason of the fact that the injured employee might institute an action against his employer in the district court. This evil is ~~limited~~ <sup>eliminated</sup> by the 1922 amendment inasmuch as the district courts are deprived of such jurisdiction. It will also be noted that the 1922 amendment exempts the master and members of the crew of a vessel from that portion of the statute which provides that workmen injured under admiralty jurisdiction are saved their rights under the workmen's compensation acts of the states wherein they might be injured. This provision was obviously placed therein with the *Knickerbocker* case in view as master and members of the crew are so closely connected with commerce itself, and any state legislation affecting them would undoubtedly be invalid as interfering with the harmony and uniformity so necessary to admiralty matters. But there is no logical reason why harmony and uniformity in admiralty matters should apply to stevedores, as they are not so closely



connected with commerce itself that it is necessary that laws relative to them should operate uniformly in the entire country. They do not travel with the ships from port to port, but remain constantly in the port where they are employed and to place the rules and limits relative to their rights when injured under the disposal and regulation of the several states would not destroy the uniformity and consistency which the Constitution aimed at on all subjects of a maritime character. State legislation relating to the rights of stevedores when injured is purely local in character, and would not in any sense destroy uniformity in admiralty matters, and this was no doubt the theory upon which Congress proceeded when the 1922 amendment was enacted in view of the *Knickerbocker* case, which was decided prior to that time.

In any event, it is the contention of the plaintiff in error that the rule enunciated in the *Knickerbocker* case has been modified by the recent case of *Grant Smith Porter Co. v. Rhode*, decided January 3, 1922, Volume 24, No. 26, Sup. Ct. Rep., page 157. In that case it appeared that the workman was injured while at work on a partially completed vessel lying in navigable waters in the state of Oregon. The state of Oregon had a so-called elective workmen's compensation act, and unless the employer and employee notified the department of their election not to come under the act, they were included. In the instant case no such notice was given, so they were automatically included within the provisions of the Ore-

gon act. In this case it is true that the work which the workman was engaged in at the time of the injury was not maritime in its nature, but the tort was committed on navigable waters, and in cases of tort, locality is the test whether or not admiralty has jurisdiction. *Atlantic Transportation Company v. Imbrovek*, 234 U. S. 52. In holding that the workman was entitled to the benefits of the workmen's compensation act of Oregon, the court said:

"Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, we answer, yes.

"Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon workmen's compensation act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

The workmen's compensation act of Washington is similar to that of Oregon in so far as the exclusive features are concerned as evidenced by section 7673, Rem. Comp. Stat., which provides, in part, as follows:

"The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation \* \* \*."

The *Rhode* case, *supra*, is authority for the position that an elective workmen's compensation act may include workmen engaged on navigable waters, and that by so doing it does not destroy the uniformity and harmony of admiralty matters.

It is contended that a compulsory act, such as the workmen's compensation act of the state of Washington, would not tend to destroy such uniformity any more than an elective act. In fact, a compulsory act would not tend to create as much confusion in admiralty matters as an elective act. The operation of the compulsory act on admiralty matters would certainly be uniform, at least throughout the state. District courts would have no jurisdiction and every workman engaged in maritime works would come within the provisions of the workmen's compensation act. Under an elective act such workmen might or might not come within the provisions of the workmen's compensation act, depending on whether or not he elected so to do, and thus create much confusion and destroy uniformity in admiralty matters.

Again, in the case of *Southern Pacific Company v. Jensen*, 244 U. S. 205, the court said:

"Construing our former opinions, it must now be accepted as settled doctrine, that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

It is therefore submitted, in view of the *Rhode* case, *supra*, that Congress has as much power to de-

fine the rights and liabilities of persons engaged in a maritime occupation as such persons would have a right themselves to do, and assuming that workmen and their employers have a legal right to contract as to the liability of the employer in case of accident, the practical operation of such a procedure would tend to destroy uniformity in admiralty matters to the same or a greater degree than if they were included within the provisions of a compulsory workmen's compensation act by virtue of an act of Congress.

Again, in the *Rhode* case, it was said:

"Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations  
\* \* \*."

If the application of an elective act would not work material prejudice to any characteristic feature of the general maritime law, it is difficult to see why the operation of a compulsory act would work such material prejudice, as both acts function the same provided the election is made to come under the elective act. It will, no doubt, be claimed by the defendant in error that the doctrine of the *Rhode* case rests entirely on contract, and that in the absence of the so-called contract, the Oregon compensation act would not have applied. If the contention that the

*Rhode* case rests purely on contract is intended to mean that the scope and jurisdiction of the act was by contract extended to a *locus* to which, in the absence of contract, it would not have extended, then the contention is in law erroneous. This is so:

(1) Because the opinions of the United States Supreme Court in the later cases of *State Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263, 66 Law Ed. —, 42 Sup. Ct. Rep. 473, and *Great Lakes Dredge & Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, page 490, make it plain that even in the absence of contract the *locus* of the injury in the *Rhode* case was within the jurisdiction of the Oregon statute;

(2) Because, assuming for the moment that the parties might voluntarily contract to come within the provisions of the workmen's compensation act, the parties under the so-called elective compensation statute do not voluntarily contract, but the statute is imposed upon them in case they within a specified time do not express their intention to stay out of the operation of the statute, and staying from under the statute is burdened with such heavy penalties that the parties are practically compelled to come within the statute, which they do by merely maintaining silence and not by contracting. In other words, the so-called elective statutes are not based on express contract, and are, in practical effect, as compulsory as the so-called compulsory statutes.

In the case of *State Industrial Commission v. Nordenholt Corp.*, *supra*, the court makes it clear that the injury in the *Rhode* case was within the scope of the statute, apart from any question of contract. The court says:

"In *Grant Smith-Porter Ship Co. v. Rhode*, a carpenter proceeding in admiralty sought damages for injuries received while at work on a partially completed vessel lying in the Willamette river. The Oregon Workmen's Compensation Law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable waters and the cause was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workmen's activities at the time had any direct relation to navigation or commerce,—it was essentially a local matter \* \* \*."

These words make it plain that the *locus* of the injury in the *Rhode* case on an incompleated ship in the course of construction on navigable waters was apart from any question of contract intended by the Oregon legislature to be covered by the scope of the Oregon act, which, like the Washington act, covered ship building. The court says that the statute prescribed the exclusive remedy for the injury in that case, and that the question was whether to give the statute (not the contract) effect in that *locus* "would work material prejudice to the general maritime law."

The *Nordenholt* case itself makes it clear that there is no distinction in the effect of the so-called

elective and compulsory statutes. The *Nordenholt* case arose under the New York Statute, which is a compulsory one. See *Duart v. Simmons* (Mass.) 211 N. E. 10. The court cites for support, the *Rhode* case, decided under the so-called elective statute. The court itself is conscious of no distinction between the two types of statutes. This is shown by the following language in the *Nordenholt* case:

“And this is true, whether awards under the act are made as upon implied agreements or otherwise.”

The theory of the New York and Washington statutes being identical and the Supreme Court of the United States having found it perfectly proper to use the *Rhode* case in support of the *Nordenholt* case, there seems to be no strong reason why there should be a distinction of this character. Again, in the recent case of *Great Lakes Dredge & Dock Co. v. Kiercjewski*, *supra*, in commenting upon the *Rhode* case, the court said:

“In the cause last cited, neither Rhode’s general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we are of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity.”

Here again the court was dealing with the New York compensation act, a so-called compulsory statute, and had it so chosen, might have distinguished the *Rhode* case on the ground that it was decided under an elective statute. But the quoted language

shows that no such distinction was in the mind of the court. The *Rhode* case rests squarely on the doctrine that state legislatures may affect admiralty jurisdiction as to local matters. Such is the doctrine developed in *Western Fuel Co. v. Garcia*, 275 U. S. 233, 66 L. Ed. 210, on which the *Rhode* case is based. It is true that in the *Rhode* case the contract of employment, viz., of building a ship, was not a maritime contract, and it may be maintained that for that reason *Rhode's* work did not affect commerce and was not closely allied thereto. The cause of action for an injured workman by reason of his injuries is created by reason of the tort and not by reason of the nature of the contract of employment. It is well settled that the test in determining whether admiralty jurisdiction does or does not prevail in tort matters is location. The liability of an employer for damages on account of injuries is not within admiralty jurisdiction when the accident occurs on land, even though the contract of employment be maritime in its nature, as the test as to whether admiralty courts have jurisdiction of tort actions is dependent on the location of the tort and not upon the question of whether the contract of employment is or is not maritime in its nature. The basis of an award under the workmen's compensation act or an action instituted in the federal court for injuries is one *ex delicto*, and the award is made for an injury sustained. In view of the fact that the injury is the thing compensated for, it is submitted that the question of whether the Work-

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men's compensation act or admiralty prevails is still the *locus* of the injury as the benefits of the workmen's compensation act are substituted for the common law rights. This being true, in determining whether or not the application of a workmen's compensation act to persons engaged on navigable waters does or does not affect the uniformity in admiralty matters, it makes no difference whether the contract of employment is maritime, if such persons were actually employed on navigable waters. Applying the provisions of the workmen's compensation act to a workman employed on navigable waters whose contract of employment is maritime in its nature would not hamper or destroy the harmony and uniformity in admiralty matters to any greater extent than applying the provisions of such act to a workman employed on navigable waters whose contract of employment was non-maritime in its nature, as was the situation in the *Rhode* case, because the test of whether admiralty has or has not jurisdiction in an action instituted to recover damages for such injury and which is based on tort is location. In fact, in the *Rhode* case the court said that admiralty courts would have jurisdiction of such a case, but that by reason of the exclusive features of the Oregon act, he would be precluded from instituting an action in the district court. There can also be no doubt of the power of Congress to take from the district court the jurisdiction in the excepted cases, as the district courts are nowhere mentioned in the United States Constitution

and are in fact, creatures of Congress. 25 C. J., p. 960; *Wisconsin v. Duluth*, 2 Dill (U. S.) 406. In its last analysis, it is difficult to see that any power was delegated to the states by the 1922 amendment. It deprives the district court of jurisdiction in certain cases, which is in no sense a delegation of power, and saved to suitors the rights under the workmen's compensation acts of the several states, and it simply gives to suitors certain rights just the same as suitors were given rights by said states' statutes in death cases, which was upheld in the *Garcia* case, *supra*. In all fairness to the court, we desire to call its attention to the case of *Farrell v. Waterman S.S. Co.* 286 Fed. 284, which apparently is not in harmony with the argument herein advanced.

Article III, section 2, of the Constitution of the United States, provides in part as follows:

“The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. \* \* \*

It is not there provided expressly that there shall be uniformity in admiralty matters in widely scat-

tered portions of this country wherein different conditions prevail and different needs are required. The objection to the 1922 amendment is that it destroys such harmony where as a matter of fact there is nothing in the Constitution itself to prevent it, although the court in the *Knickerbocker* case did state that the Constitution itself adopted and established as a part of the laws of the United States approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. It would seem that if the framers of the Constitution of the United States intended that the general rules of maritime law should be embodied therein, they would in fact be so embodied in express terms. As was said by Mr. Justice Holmes in the dissenting opinion in the *Knickerbocker* case, *supra*:

“I cannot doubt that in matters with which Congress is empowered to deal, it may make different arrangements for widely different localities with perhaps widely different needs. See *U. S. v. Press Publishing Company*, 219 U. S. 1.”

It seems to be well settled that where Congress legislates on admiralty subjects, such legislation is conclusive on the states, and that it was deemed by Congress that the legislation on the particular subject should be uniform throughout the states of this nation. It is also well settled that so long as Congress does not regulate the subject, but leaves the field open, such subject, even though it be maritime in its nature,

may be regulated by state legislation. It might be more satisfactory to have a uniform law relative to maritime subjects, and Congress has power to legislate and make such regulations uniform, but if it fail to do so, it is submitted that the states may, under the police power, regulate maritime subjects within the geographical boundaries of the states. This is the position taken by Mr. Justice Pitney in the dissenting opinion in the case of *Southern Pacific v. Jensen*, 244 U. S. 243, a portion of which we quote:

“In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

“Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce

was controlled by the laws of the States. This was because the subject was within the police power, and the divergent exercise of that power by the States did not regulate, but only incidentally affected, commerce among the States. *Sherlock v. Alling*, 93 U. S. 99, 103; *Second Employers' Liability Cases*, 223 U. S. 1, 54. It required an act of Congress (Act of April 22, 1908, c. 149, 35 Stat. 65) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Express Co. v. Croninger*, 226 U. S. 491, 504. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the state authorities, *Smith v. Alabama*, 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Telegraph Co. v. James*, 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington v. Georgia*, 163 U. S. 299, 304, 308, etc.; regulating the heating of passenger cars, *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628; prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made, *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 136, 137; a like result arising from rules of law enforced in the state courts in the absence of statute, *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 488, 491; statutes prohibiting the transportation of diseased cattle in interstate

commerce, *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 630, 635; *Reid v. Colorado*, 187 U. S. 137, 147, 151; statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce, *Atlantic Coast Line R. R. Co. v. Mazursky*, 216 U. S. 122, even since the passage of the Carmack Amendment, *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412, 417, 420; statutes regulating the character of headlights used on locomotives employed in interstate commerce, *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U. S. 280; *Vandalia R. R. Co. v. Public Service Commission*, 242 U. S. 255. All these cases affected the responsibility of interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters stil remain subject to the regulation of the several States. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. 584, 585, c. 3591, sec. 1) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 612.

“In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the First Congress (Act of August 7, 1789, c. 9, sec. 4, 1 Stat. 53, 54; Rev. Stats., sec. 4235), and this court, in many decisions, has sustained local regulations of that character. *Cooley v. Board of Wardens*, 12 How. 299, 320; *Steamship Co. v. Joliffe*, 2 Wall. 450, 459; *Ex parte McNeil*, 13 Wall. 236, 241; *Wilson v.*

*McNamee*, 102 U. S. 572; *Olsen v. Smith*, 195 U. S. 332, 341; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195.

"It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208; *Hamilton v. Vicksburg, Shreveport & Pacific Railroad*, 119 U. S. 280; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 165 U. S. 365; *Manigault v. Springs*, 199 U. S. 473, 478."

The workmen's compensation act of the state of Washington was enacted by virtue of the police power of the state, which brings the present case within the rule announced by the cases cited in the quotation from the dissenting opinion in the *Jensen* case, *supra*. But in this case, a stronger situation is presented than in the case where Congress simply fails to act and leaves the field open to state legislation, for here Congress has not only failed to act, but has specifically declared that federal courts shall have no jurisdiction in cases where workmen are injured in admiralty jurisdiction in states which have a workmen's compensation act. This is not a case where Congress has left the field open by failure to legislate, but a case where Congress has specifically declared by legislation that the field shall be left open to the several states.

## 2. THE WORKMEN'S COMPENSATION ACT OF WASHINGTON INCLUDES STEVEDORES.

Some contention will be made that in any event the workmen's compensation act of Washington does not include stevedores employed on ships lying in the navigable waters of this state. Section 7674, Rem. Comp. Stat., in defining extra hazardous work, includes "steamboats, tugs and ferries," and section 7676, which divides the different extra hazardous industries into classes, enumerates in Class 42 thereof:

"Class 42. Stevedoring, longshoring, wharf operation."

It will be contended that this only applies to stevedores working on ships lying on inland and non-navigable waters, but this contention is answered by section 7694, Rem. Comp. Stat., which reads as follows:

"The provisions of this act shall apply to employers and workmen engaged in maritime works or occupations only in cases where and to the extent that the pay-roll of such workmen may and shall be clearly separable and distinguishable from the pay-roll of workmen employed under circumstances in which a liability now exists or may hereafter exist in the courts of admiralty of the United States: *Provided*, That as to workmen whose pay-roll is not so clearly separable and distinguishable, the employer shall in all cases be liable in damages for injuries to the same extent and under the same circumstances as is specified in the case of railroads in the first proviso of section 7693."

This statute includes all workmen engaged in maritime works whose pay-roll is separable and distinguishable from those workmen who have a right



of action in admiralty. If the 1922 amendment is valid, all workmen included in the prior portion of the workmen's compensation act would be under the act, as none of them would have a right of action in admiralty by virtue of the 1922 amendment and there would be no payrolls of workmen who have a right of action in admiralty to be separable and distinguishable from the workmen included by section 7694, *supra*, and they would all come under the provisions of the workmen's compensation act of the state of Washington.

To recapitulate, it is respectfully submitted:

1. Stevedores are included within the workmen's compensation act of the state of Washington if the 1922 amendment is constitutional and (2) does not unlawfully delegate powers to the several states, as the operation of a compulsory workmen's compensation act on persons engaged on navigable water does not hinder or materially prejudice the uniformity of admiralty matters to any greater extent than a so-called elective compensation act would do.

It is therefore respectfully submitted that the decision of the supreme court of the state of Washington should be reversed.

THE STATE OF WASHINGTON,  
JOHN H. DUNBAR,  
*Attorney General.*

RAYMOND W. CLIFFORD,  
*Assistant Attorney General.*

*Attorneys for Plaintiff in Error.*

GUIE & HALVERSTADT,  
Of Counsel.

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Wm. S. S.

**In the Supreme Court of the United States**

**October Term, 1912**

**The People of Washington,**

*Plaintiff in Error,*

**W. G. Dawson & Company, a corporation,**

*Defendant in Error.*

**ON WRIT TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON**

**BRIEF OF DEFENDANT IN ERROR**

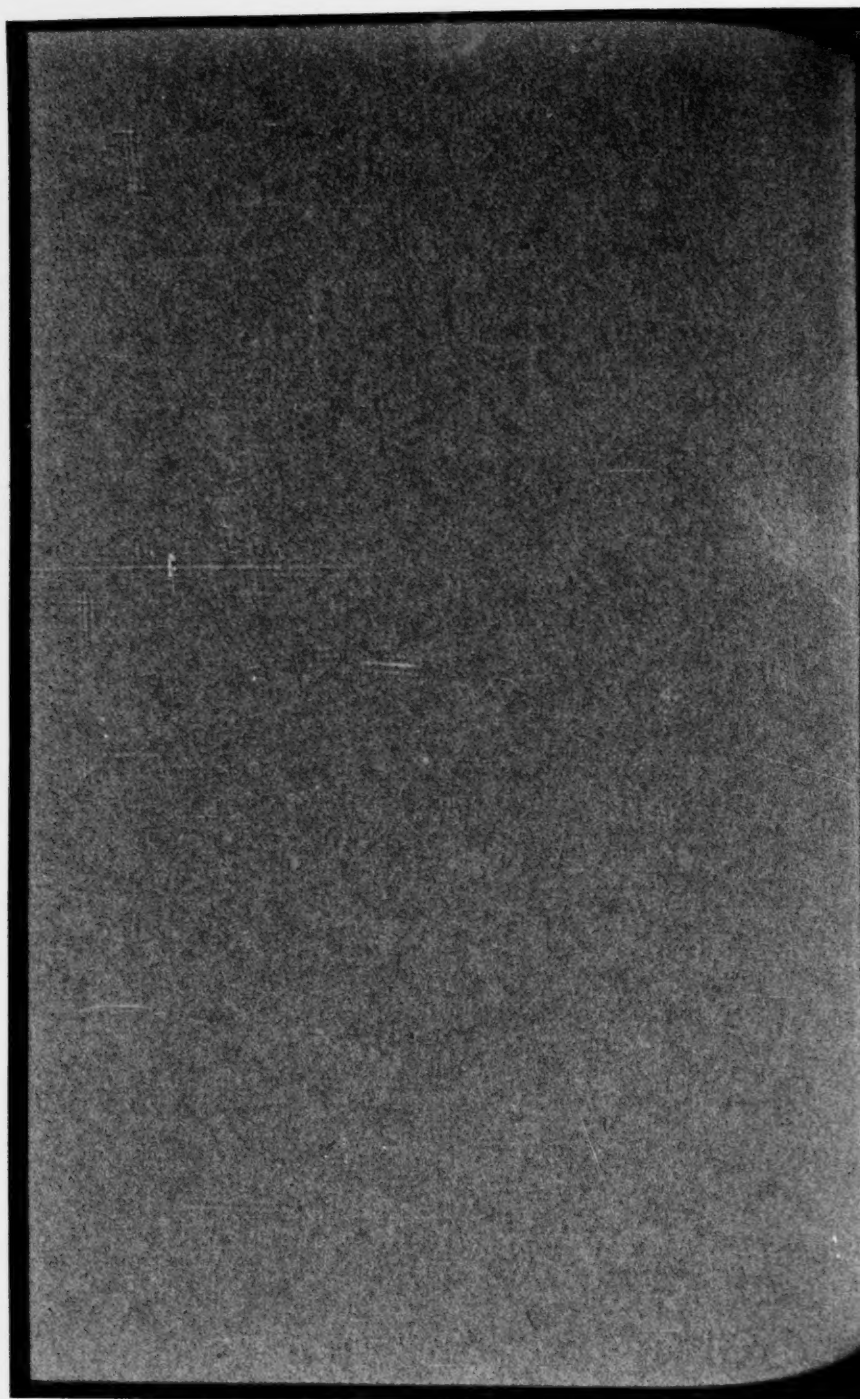
**GOSBORN & TREHUNE,**

*Attorneys for Defendant in Error.*

**Office and Postoffice Address:**

**2002 L. C. Smith Building, Seattle, Washington.**

and other cases, etc.



No. ....

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**In the Supreme Court of the United States**

OCTOBER TERM, 1923

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THE STATE OF WASHINGTON,  
*Plaintiff in Error,*

v.

W. C. DAWSON & COMPANY, a corporation,  
*Defendant in Error.*

---

ON ERROR TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

---

**BRIEF OF DEFENDANT IN ERROR**

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COSGROVE & TERHUNE,  
*Attorneys for Defendant in Error*

Office and Postoffice Address:

2002 L. C. Smith Building, Seattle, Washington.

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# In the Supreme Court of the United States

OCTOBER TERM, 1923

THE STATE OF WASHINGTON, <i>Plaintiff in Error,</i>	}	No.....
—V.—		
W. C. DAWSON & COMPANY, a corporation, <i>Defendant in Error.</i>		

ON ERROR TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

## BRIEF OF DEFENDANT IN ERROR

By and through the Constitution of the United States the powers of the government were separated into three classes, legislative, judicial and executive, and appropriate departments were created for each.

“The judicial power shall extend to \* \* \* all cases of admiralty and maritime jurisdiction; \* \* \*” Sec. 2, Article III, Constitution.

The power was vested:

“In one Supreme Court, and in such inferior courts as the Congress may from time to



time ordain and establish." Sec. 1, Article III, Constitution.

Under Section 8 of Article I of the Constitution, the legislative department, or Congress, was given power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Pursuant to the Constitutional direction, Congress created the Judiciary Act of 1789. As was stated by this court in the case of *Knickerbocker Ice Company v. Stewart*, 64 L. Ed. 834, 253 U. S. 149:

"The provision of Section 9, Judiciary Act, 1789 (chap. 20, 1 Stat. at L. 76), granting to United States district courts 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction \* \* \*, saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it', was carried into the Revised Statutes (Secs. 563 and 711, Comp. Stat. Secs. 991, 1233), and thence into the Judicial Code (clause 3, sections 24 and 256). The saving clause remained unchanged until the statute of October 6, 1917, added 'and to claimants the rights and remedies under

the Workmen's Compensation Law of any state.' "

The court then declared the 1917 amendment to the saving clause unconstitutional saying:

"Having regard to all these things, we conclude that Congress undertook to permit application of workmen's compensation laws of the several states to injuries within the admiralty and maritime jurisdiction, and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. And, so construed, we think the enactment is beyond the power of Congress."

The decision recognized the right of states to supplement the maritime law to some extent, and reference was made to *The Hamilton*, 52 L. Ed. 264, 207 U. S. 398, but the court denied the right of a state to modify, change or extinguish any portion of the maritime law or to modify, change or extinguish any maritime right. It referred to the New York Workmen's Compensation Act as follows:

"The state enactment prescribes exclusive rights and liabilities, undertakes to secure

their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court."

And then held that the doctrine of *The Hamilton* "may not be extended to such a situation."

The State of Washington has a Workmen's Compensation Act, which provides: (Remington's Compiled Statutes) Sec. 7673:

"\* \* \* The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Sec. 7682:

"If any employer shall default in any payment to the accident fund or the medical aid fund, the sum due shall be collected by

action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. If such default be after demand, there shall also be collected a penalty equal to twenty-five per centum of the amount of the defaulted payment or payments, and the commission may require from the defaulting employer a bond to the state for the benefit of the accident and medical aid funds, with surety to their satisfaction, in the penalty of double the amount of the estimated payments which will be required from such employer into the said funds for and during the ensuing year, conditioned for the prompt and punctual making of all payments into said funds required during said year period, together with any penalty or penalties incurred. In case of refusal or failure after written demand personally served to furnish such bond, the state in an action brought by the attorney general in its name shall be entitled to an injunction restraining such delinquent from prosecuting an extra-hazardous occupation or work until such bond shall be furnished, and any sale, transfer or lease attempted to be made by such delinquent during the period of such default, of his works, plant or lease thereto shall be

invalid until all past delinquencies are made good and such bond furnished."

Sec. 7704:

"Every person, firm or corporation who shall violate or fail to obey, observe or comply with any rule of the department promulgated under authority of this act, shall be subject to a penalty of not to exceed two hundred and fifty dollars (\$250). Such penalty may be recovered in a civil action in the name of the state, and shall be paid into the accident fund."

The foregoing sections of the Washington act are set forth for the purpose of showing that that act, like the New York act, "Prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court."

On June 10, 1922 Congress endeavored to reenact the 1917 amendment free from this court's objections by the passage of what plaintiff in error calls the "1922 amendment." A comparison of the two amendments shows the following differences.

1. The 1917 Act covered all "claimants"; the 1922 Act excludes masters and members of crews of vessels.

2. The 1917 Act did not attempt to force a suitor to take under a Workmen's Compensa-

tion Act; the 1922 Act does, since it provides "which rights and remedies when conferred by such law shall be exclusive."

3. The 1917 Act recognizes Workmen's Compensation Acts of "any state"; the 1922 Act is broader in that it recognizes Workmen's Compensation Acts of "any state, district, territory, or possession of the United States."

4. The 1917 Act gives the suitor the option of taking under the Workmen's Compensation Act or pursuing his remedy in the District Court; the 1922 Act gives the suitor no option, but does give to the legislatures of the various states, districts, territories and possessions of the United States, the option of leaving jurisdiction in the district courts or of taking it away, and upon such taking to prescribe the rights and remedies of the suitor and the corresponding responsibilities and liabilities of the employer.

The plaintiff in error advances the two following arguments:

*First*, the elimination of the master and members of the crew from the classification of "claimants" makes the amendment local in character and thus avoids interference with the harmony and uniformity of the general maritime law required by the constitutional grant;

*Second*, the withdrawal from the district court of jurisdiction in localities where Workmen's

Compensation Acts apply is such an abandonment of the field by the Federal Government that the states are free to act.

#### ANSWERING THE FIRST ARGUMENT.

We call attention to the fact that the Washington Workmen's Compensation statute is compulsory and exclusive. The Oregon statute (*Grant Smith-Porter Co. v. Rhode*, 66 L. Ed. 321, 257 U. S. 469) is elective. The New Jersey statute is optional. (*Netherlands American Steam Navigation Company v. Gallagher*, 282 Fed. 171). The New York statute is compulsory and exclusive. (*Knickerbocker Ice Company v. Stewart*, *supra*). Other state statutes are or may be compulsory and exclusive, or optional, or they may or may not have the same penalties or bases of awards. Other states may not have any Workmen's Compensation Acts at all.

If the 1922 amendment is valid, a vessel may this week touch at a Washington port and her owners perforce become subject to the Washington Workmen's Compensation Act. Next week it may touch at an Oregon port, and the owners find themselves under the Oregon act. The week following, the vessel may be in a California port, at which time the owners are forced under its act. A few weeks following, the vessel may be in the ports of a state having no Workmen's Compensation Act, and the owners are there subject to

the general maritime law. The responsibilities and liabilities of the ship and her owners change as the vessel moves from state to state.

A vessel and her owners may find themselves subject to similar changes in responsibilities and liabilities even in the same port. For illustration: Suppose a vessel today enters a Washington port, her owners find themselves subject to a Workmen's Compensation Act. The vessel leaves, and when it returns the legislature of the State of Washington may have changed its compulsory and exclusive act to an optional act. The vessel may leave and come again. This time it may find that the legislature has changed its whole scheme of workmen's compensation, and on a further visit it may be found that the legislature has abolished its Workmen's Compensation Act, with the owners' rights and liabilities fixed (by the state) according to the general maritime law.

All this time these vessels and their owners in our American ports will be subject to the general maritime law as to the claims of masters and members of the vessels' crews.

This legislation cannot be said to affect only American ships and thereby be local in character. Every foreign ship touching an American port would come within the law, and while they are not permitted to engage in coastwise trade, they are permitted to travel from one American port to



another in the discharge of cargo. They and their owners would become subject to the varying responsibilities and liabilities imposed by the various legislatures as the ship moves from state to state.

The 1917 amendment placed stevedores and masters and members of crews in the one general class, to-wit, "claimants." The plaintiff in error states that masters and members of crews move about from state to state, while stevedores are intransient; that by eliminating the transients from the class the act becomes local in character and legal effect, and therefore no longer violates the uniformity, harmony and consistency rule. If we are to admit that the 1917 amendment could be aided by the elimination of transients, we nevertheless observe that all of the transients were not eliminated in the enactment of the 1922 amendment. It may be that the latter amendment has eliminated all transient "claimants", but there are other transient persons (not "claimants" and not eliminated) who are legally interested in every maritime controversy raised by the intransient stevedores. The vessels, which under the maritime law are recognized as individuals, are transient. Owners' rights and obligations in legal effect move about from port to port and state to state as their vessels so move, and in that respect are transients. There can be no maritime commerce without the following elements, to-wit:

ships, ship owners, masters, crews and stevedores. Whenever one of the elements has a right as against one of the other elements, there exists a corresponding obligation. Under the general maritime law the right of an injured stevedore for damages was something more than an abstract idea. It was susceptible of enforcement against transient elements of maritime commerce, the vessel or its owner. To say that such rights of stevedores are local because the stevedores may not move from port to port, is to fail to take into consideration the fact that the corresponding obligations are those of transients.

This court further said in the *Knickerbocker* decision:

“Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise a confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.”

In *The Roanoke*, 47 L. Ed. 770, 189 U. S., 185, it was held that a state could not create liens for materials used in repairing a foreign ship. As stated before, the appellant claims uniformity because stevedores are said to be intransient. In the *Roanoke* case, causes of action of lienors (under the law of the State of Washington) were as local in character and effect as the causes of action of the stevedores now being discussed. It

was recognized that if foreign ships could be subjected to liens created by the State of Washington, they could likewise be subjected to liens created in the ports of the various other states of this country. Wherein is there uniformity, harmony, and consistency in the subjection of ships and their owners to the "onerous conditions and penalties" of various states Workmen's Compensation Acts as to stevedores when there is none in the subjection of the same ships and their owners to the claims of material men under state laws? Would anyone say that the decision in the *Roanoke* case would have been different if the lien act in question had excluded from its privileges those material men having offices and places of business in different states, and who might travel from state to state in the furnishing of supplies and materials?

In the *Roanoke* case the claimant had furnished material. The stevedores as claimants furnished labor. Clearly the uniformity, harmony, and consistency required in maritime matters is not to hinge upon the question of whether the claim of the claimant is one for labor or material. Neither is it to depend upon the question of whether the claimant may have a more or less permanent place of business or residence.

Plaintiff in error overlooks the fact that for every valid claim there is a corresponding obligation. The one cannot exist without the other.

There can be no harmony, uniformity, and consistency in the administration and judicial settlement of maritime "cases" unless all maritime elements of all the states are brought within and under the same rules and laws, or, in other words, the same judicial system.

The 1917 amendment was not found invalid because it included masters and members of crews in the classification "claimants". It was because the act was contrary to and interfered with the maritime "system of law". The exclusion instead of bringing harmony, uniformity and consistency, creates an even more discordant, multiform and inconsistent maritime "system of law".

In *Southern Pacific Co. v. Jensen*, 61 L. Ed. 1086, 244 U. S. 205, the court in referring to the New York Workmen's Compensation Act, said:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

"A far more serious injury would result to commerce than could have been inflicted

by the Washington statute authorizing a material man's lien in *The Roanoke*."

The plaintiff in error advances the argument that the case of *Western Fuel Company v. Garcia*, 66 L. Ed. 210, 257 U. S. 211, breaks down the uniformity rule set forth in the *Jensen* and *Knickerbocker* cases. Such an interpretation of the decision is not borne out upon examination. The court in that case said:

"It is the established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land."

Since the death statute in question created a new legal liability the court, in effect, held that the local rule as to the statute of limitations might apply. Had the cause of action been one recognized by the Constitution as a part of the admiralty and maritime law, it would not have been subject to the local statute of limitations.

The decision in the *Grant Smith-Porter Ship Co v. Rhode*, *supra*, is also said to break down the uniformity rule.

The Oregon Workmen's Compensation law gave to the employer and the employee the option of declining to go under the act; that is to say, if either did not wish to come under the act, he was required to so notify the state authorities. If no such notice was given, the act became applicable to both. The certificate from the Circuit Court of Appeals stated:

"Prior to the time of the injury, neither respondent, the employer, nor libellant, the workman, had notified the appropriate state authority of any rejection of the provisions of the Workmen's Compensation Act, and up to the time of the injury, respondent, the employer, had taken all the steps required by the compensation act to bring the work under its provisions; and there had been deducted and paid over to the Commission administering the compensation fund, payments from wages earned and paid libellant, the workman, up to the time of the injury."

This court held:

"And as both parties had accepted and proceeded under the statute by making payment to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law.

\* \* \* Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, *as between them*-

*selves* (Italics ours) by a local rule, would not necessarily work material prejudice to any characteristic feature of general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

It was held that the contract for the construction of the vessel upon which Rhode was working at the time he was injured was nonmaritime, and further, that the general admiralty jurisdiction extended to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying in the navigable waters within the state. The right of Rhode to proceed in admiralty for the recovery of damages for his injuries was not dependent upon the question of whether the ship construction contract was maritime or non-maritime. It was dependent upon the question of whether or not he was injured upon the navigable waters, and if so, whether he had contracted away his right to proceed in admiralty.

The plaintiff in error seems to be confused as to the *Rhode* "contract". When the Court said:

"Neither Rhode's immediate employment nor his activities at the time had any direct relation to navigation or commerce,"

it was evidently referring to the contract of employment, but when it says,

"And as both parties had accepted and pro-

ceeded under the statute by making payment to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law,"

it undoubtedly referred to another contract impliedly created after the contract of employment was entered into. This other contract was in effect a relinquishment by the employer and employee Rhode of their rights to decline to come under the Workmen's Compensation Act. It must be remembered that both parties had paid into the state accident fund in order that Rhode might take therefrom in the event of injury. Under this implied contract Rhode in effect agreed not to bring any suit in the district court, or any other court, for the recovery of damages for injuries which he might sustain, but on the contrary to content himself with such an award as might be given him by the state compensation officials. After the contract of employment was entered into, the employer and employee had open to them several options. They could agree to take under the Workmen's Compensation Act; or if one declined and so notified the state authorities, the employee would have been entitled to have brought action in the district court for the recovery of his damages; or the employer and employee might have agreed to submit to arbitration such claims as the workman might have for injuries sustained.



It is possible that they might have been able to fix in advance as among themselves a scale of agreed damages.

The court did not state that the Oregon compensation statute could be given effect, because to do so would not "work material prejudice to the general maritime law". In effect it stated that the district court should not entertain the suit of one who had agreed with the other party to the controversy that he and they would look to no other statute, and so agreeing "among themselves", no material prejudice would be worked to the general maritime law.

In the case at bar we find no contract to forego any rights, no waiver, no estoppel. We are dealing with the naked question of the right of the state to force against their wills, employers and employees (the latter engaged in labor on the navigable waters of Puget Sound) to give up their right to submit their differences to the federal judicial power, and to take instead whatever the state may afford.

Neither the *Rhode*, *Nordenholt*, or *Kierejewski* cases cited by plaintiff in error, in any way modifies or changes any of the holdings of the *Knickerbocker* decision.

## ANSWERING THE SECOND ARGUMENT.

The Washington Workmen's Compensation Act is exclusive as to both workmen and their employers. Does the 1922 amendment destroy the injured stevedore's maritime right to recover through the federal judicial power damages for his injury; or does it only prevent him from pursuing his right in the district court; or do his rights, notwithstanding the act, remain as they were prior to its passage? As hereinbefore stated the Constitution provides that,

"The judicial power shall extend to \* \* \* all cases of admiralty and maritime jurisdiction."

In the *Knickerbocker* decision the court pointed out that the states through the Constitution had adopted a maritime law, saying:

"The Constitution itself adopted and established as part of the laws of the United States appropriate rules for the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction."

In *The Lottawanna*, 22 L. Ed. 654, 21 Wall 558, the court said:

"That we have a maritime law of our own operative throughout the United States cannot be doubted. \* \* \* One thing, however, is unquestionable; the Constitution

must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

This court further said in the *Knickerbocker* decision:

"The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress."

Neither Congress nor the states can extend or narrow the limits of the maritime law and admiralty jurisdiction.

In *The Lottawanna*, *supra*, this court said:

"The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it greater, or (it may be added) narrower than

the judicial power may determine those limits to be."

The Constitution imposed upon Congress the duty of creating the necessary inferior courts. The whole judicial power must be considered vested in such courts. The failure of Congress to create the necessary courts does not affect the scope of the judicial power.

In *Martin v. Hunter's Lessee*, 4 L. Ed. 97, 1 Wheat. 304, the Supreme Court, referring to the article creating and defining the judicial power of the United States, said:

"The language of the article throughout is manifestly designed to be mandatory on the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. \* \* \* Could Congress have lawfully refused to create a supreme court, or to vest it in the constitutional jurisdiction? \* \* \* Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office. But one answer can be given to these questions: it must be in the negative. \* \* \* The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at

their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution they might defeat the Constitution itself; a construction which would lead to such a result cannot be sound. \* \* \* The first article declares that 'all legislative powers herein granted shall be vested in a Congress of the United States.' Will it be contended that the legislative power is not absolutely vested? That the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that 'the executive power shall be vested in a President of the United States of America.' Could Congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department? \* \* \* The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all. \* \* \* It would seem, therefore, to follow that Congress are bound to create some

inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority. \* \* \* The admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts \* \* \* in which the principles of the law and comity of nations often form an essential inquiry. \* \* \* The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever. \* \* \* No parts of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance. \* \* \*

Congress cannot take anything away from the vested judicial power.

In *Den v. The Hoboken Land and Improvement Co.*, 15 L. Ed. 372, 18 How. 272, the Supreme Court said:

“To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination.”

Although it is the duty of Congress to provide the necessary courts and the proper laws for the carrying out of the powers granted by the Constitution, it cannot delegate any of its duties or legislative power to the states. In the *Knickerbocker* decision, this court said:

“Its (Congress’) power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legis-

lation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. \* \* \*

The subject was intrusted to it (meaning Congress) to be dealt with according to its discretion—not for delegation to others.

\* \* \* Congress cannot transfer its legislative power to the states—by nature this is non-delegable.”

It does not seem that there is any question that stevedores working upon navigable waters of the United States are engaged in maritime pursuits, and that their injuries while so working are maritime, and that their rights and liabilities are clearly within the admiralty jurisdiction.

In *Southern Pacific Co. v. Jensen*, *supra*, the court said:

“The work of a stevedore in which the deceased was engaged, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.”

Since long before the enactment of the Constitution, seamen injured in employment upon navigable waters have been by virtue of the general maritime law entitled to receive wages, maintenance and cure. Other workmen have been en-



titled to receive more. It is doubtful whether Congress has authority to pass a law to the effect that no seamen shall have any right to receive wages, maintenance and cure when injured, or a law taking from the stevedore his right to recover damages when injured, without providing compensation from some other source. It is to be noted that in the passage of the 1922 amendment Congress has not declared "no compensation."

It has attempted to separate the injured workmen into two classes.

First, the masters and members of vessels' crews, whose rights and remedies remain as before the passage of the amendment; and,

Second, all other workmen, including stevedores, whose rights and remedies shall be contingent upon the existence of a state workmen's compensation act, at the point where the injuries are received.

The device used to create the separation was the attempted elimination of the jurisdiction of district courts as to the causes of action of injured members of the second class. Even though the district court may have lost its jurisdiction, the injured members of the second class still have a right to have compensation fixed by or through a federal forum. In *The Siren*, 19 L. Ed. 129, 7 Wall. 152, in *The Davis*, 19 L. Ed., 875, 10 Wall. 15, and in *The Avon*, No. 860 Fed Cas., the court held that the existence of a

lien is not dependent upon the ability of the claimant to enforce it.

In *Chelentis v. Luckenbach*, 62 L. Ed. 1171, 247 U. S. 372, the court held:

"The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. \* \* \* And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' "

The right of the seaman to wages, maintenance, and cure, and the stevedore for damages,

did not come into being by reason of any Congressional act. It was recognized by and through the adoption of the Constitution. While it may be that Congress has authority to enact legislation modifying or changing this right, nevertheless it cannot delegate to a state its mixed privilege and duty, either directly or indirectly, by specific act or the attempted throttling of the judicial power.

Congress by the creation of the district court did not create judicial power. It only manufactured judicial machinery. The same creative powers which provided for Congress itself, at the same time created judicial power, and by adoption established the maritime and admiralty law of the United States.

Let us further examine the situation, assuming the 1922 amendment to be valid. Suppose we start with the state of New York, for the purposes of illustration, and assume that it has no Workmen's Compensation Act. It must then be admitted that the United States District Court is open to injured stevedores for the recovery of damages sustained while working upon the navigable waters in that state. In other words the district court has jurisdiction. The judicial machinery is ready to perform its function. Suppose that tomorrow the legislature passes a Workmen's Compensation Act, the same taking effect immediately. At once, so far as the steve-

dore is concerned, the federal judicial machinery, which today might be exercised on his behalf, has become paralyzed. Suppose further, that on the day following, the same legislature repeals its Workmen's Compensation Act. Immediately the paralyzed federal judicial machinery is given life, and is ready to function. To state the situation in another way, the jurisdiction of the District Court is dependent upon the acts of the New York legislature, and as it is so dependent upon that legislature, other District Courts are likewise dependent upon the acts of other legislatures. We might liken the jurisdiction of the federal District Court to a lighted electric lamp. With the federal power on, it furnishes light to stevedores. Upon a state pushing a legislative electric button, the power is turned off and the light goes out, with darkness for stevedores. Another push of the legislative button, and the federal judicial power is restored. There are as many buttons as there are "states, districts, territories, and possessions of the United States." The federal judicial power is impotent at the will of a state legislature.

The argument of the plaintiff in error that the federal government has withdrawn from this particular field, and having so withdrawn, the states may enter, is incorrect as a statement of fact. Correctly stated, Congress has not attempted to withdraw, but has issued a permit to the states to effect the federal withdrawal at their

pleasure. This is beneath the dignity of the government of the United States. It is unthinkable that the federal District Court must have the legislative permission of the states to exercise the federal judicial power.

Through Section 2, Article III of the federal Constitution heretofore set out, the judicial power is extended to cases other than "admiralty and maritime." If Congress by the elimination of a judicial forum can take maritime cases from federal judicial power, then it may take other cases away, and continue the whittling away process until the whole judicial department, including this Court, has lost its power. The Constitution of the United States will have thereby become altered or repealed in a way not provided for by its makers. If Congress can wipe out the judicial power, what is to hinder it from destroying the executive power? Nothing would better please the radicals and misguided uplifters of this country than to discover such an opportunity to break down our Constitution.

This particular amendment was recently held unconstitutional in *Farrel v. Waterman S. S. Co.*, 286 Fed. 284, the Court saying:

"But under the constitutional provisions the admiralty court must have jurisdiction of this admiralty and maritime law as so altered or amended. It is one thing to make or alter a law, and quite another thing to

declare what it is as written. The one is legislative, the other judicial. It is one thing to write a law, and quite another to declare by what tribunal it shall be construed.

“The Constitution gave one of these functions to the Legislature, and the other to the courts. Congress has no more right or power to take away from the federal courts their jurisdiction to hear and construe the laws than the courts have to assume the power to write the laws. That the maritime law referred to in the Constitution was the general uniform system in force when the Constitution was adopted is held in the *Lottawanna* and the *Jensen* cases, and in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. In the *Jensen* case it was held no state could change or alter this uniform system. In the *Knickerbocker* case it was held that Congress could not delegate to the states the power to change or alter the uniformity of the system.

“Even a casual reading of the reports both to the House and the Senate shows that this is just what the present amendment was intended to do. The act makes the rights and remedies, when conferred by the state, territory or district, exclusive, after limiting such

provisions to persons other than the master or members of the crew of a vessel. It then denies jurisdiction to the District Courts as to actions arising out of injuries to or death of persons other than the master or members of the crew, where compensation is provided for such person by the Workmen's Compensation Law of any state, district, or territory, but fails to confer this jurisdiction upon any other federal court. Some federal court must have jurisdiction of 'all cases of admiralty and maritime jurisdiction.' *Martin v. Hunter*, 1 Wheat. 326, 4 L. Ed. 97.

"The work of a stevedore is as much of a maritime character as that of a seaman. *The Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; *So. Pacific Co. v. Jensen*, 244 U. S. 217, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A., 1918 C, 451, Ann. Cas. 1917 E, 900. So it is as much within the jurisdiction of the admiralty courts. It is difficult to see how Congress could refer to the states the right to make varying provisions for stevedores, if they could not do so as to seamen."

From the foregoing the following conclusions must be deduced:

1. The federal judicial power cannot be extended, narrowed, or given away by Congress.
2. Congress is charged with the duty of provid-

ing judicial machinery and making the necessary laws to carry out the judicial grant. It cannot evade or refuse to perform its duty.

3. The 1922 amendment contravenes Section 2, Article III of the Constitution of the United States, insofar as it attempts a delegation of either judicial or legislative powers to the states.

4. It further contravenes the same section and article of the Constitution insofar as it attempts to withdraw jurisdiction from the federal judiciary as to the specified admiralty and maritime cases.

5. The attempt to deprive the District Court of jurisdiction is a nullity since Congress has provided no substitute federal forum.

6. The 1922 amendment failing, the action at bar is without support, and the decision of the state Supreme Court should be affirmed.

Respectfully submitted,

COSGROVE & TERHUNE,

*Attorneys for Defendant in Error*

*Robert S. Terhune*  
*Howard S. Cosgrove*



JAN 7 1924

WM. R. STANBURY

CLERK

No. 366

Supreme Court of the United States  
OCTOBER TERM, 1923.

THE STATE OF WASHINGTON,  
*Plaintiff in Error,*

v.

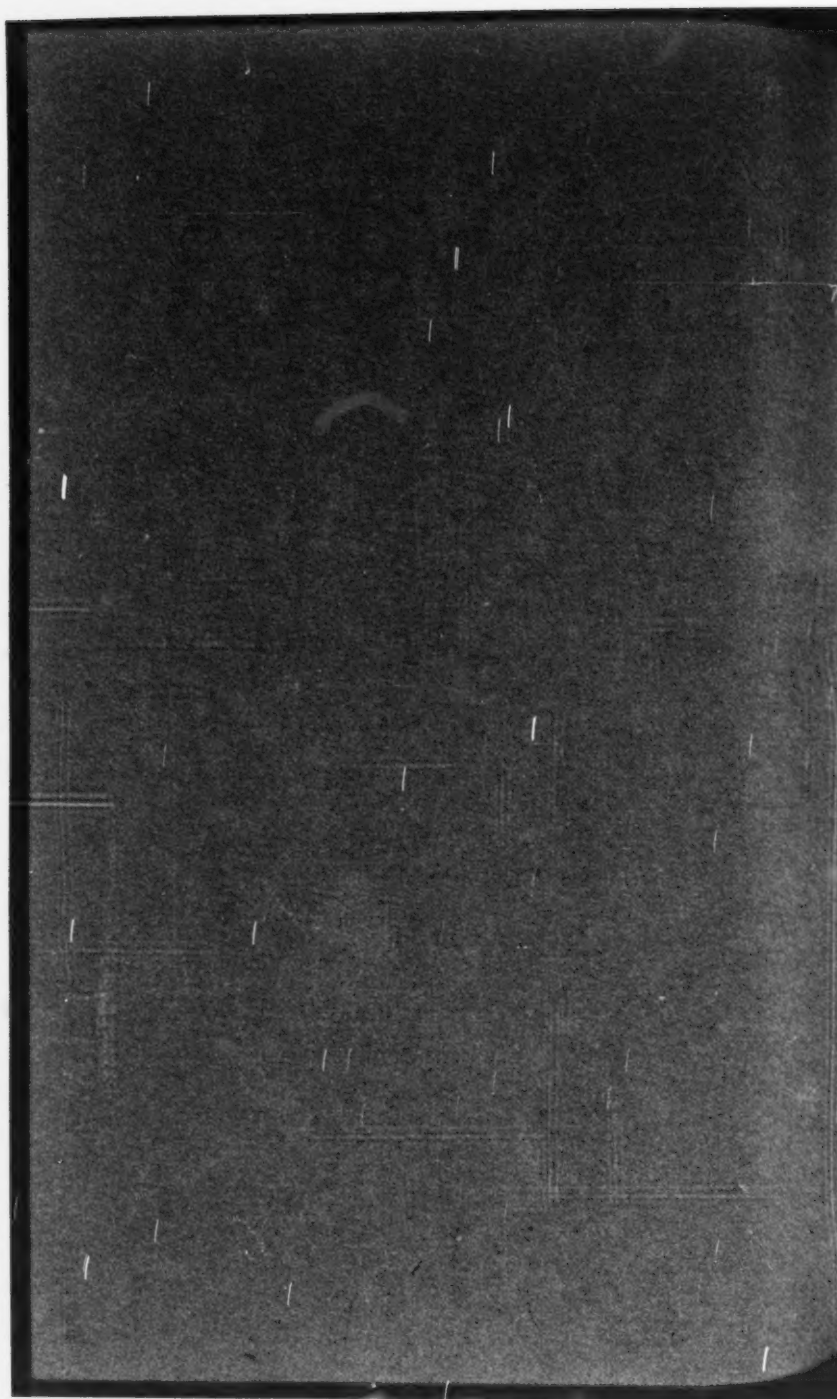
W. C. DAWSON & COMPANY, a  
corporation,  
*Defendant in Error.*

WRIT OF ERROR TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON.

BRIEF OF AMICUS CURIAE

ALFRED J. SCHWEPPE,  
*Amicus Curiae.*

Office and Postoffice Address:  
1702 L. C. Smith Building, Seattle, Wash.



No.....

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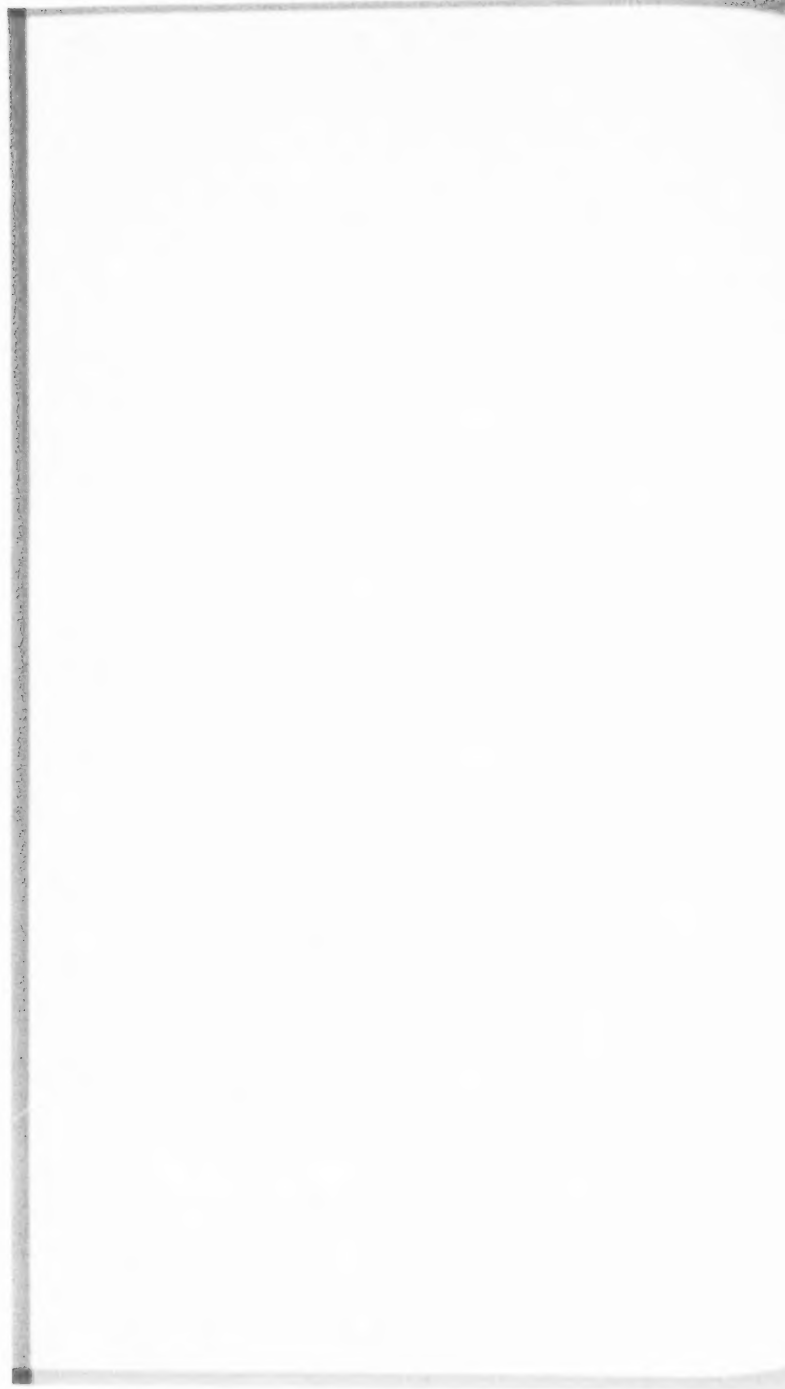
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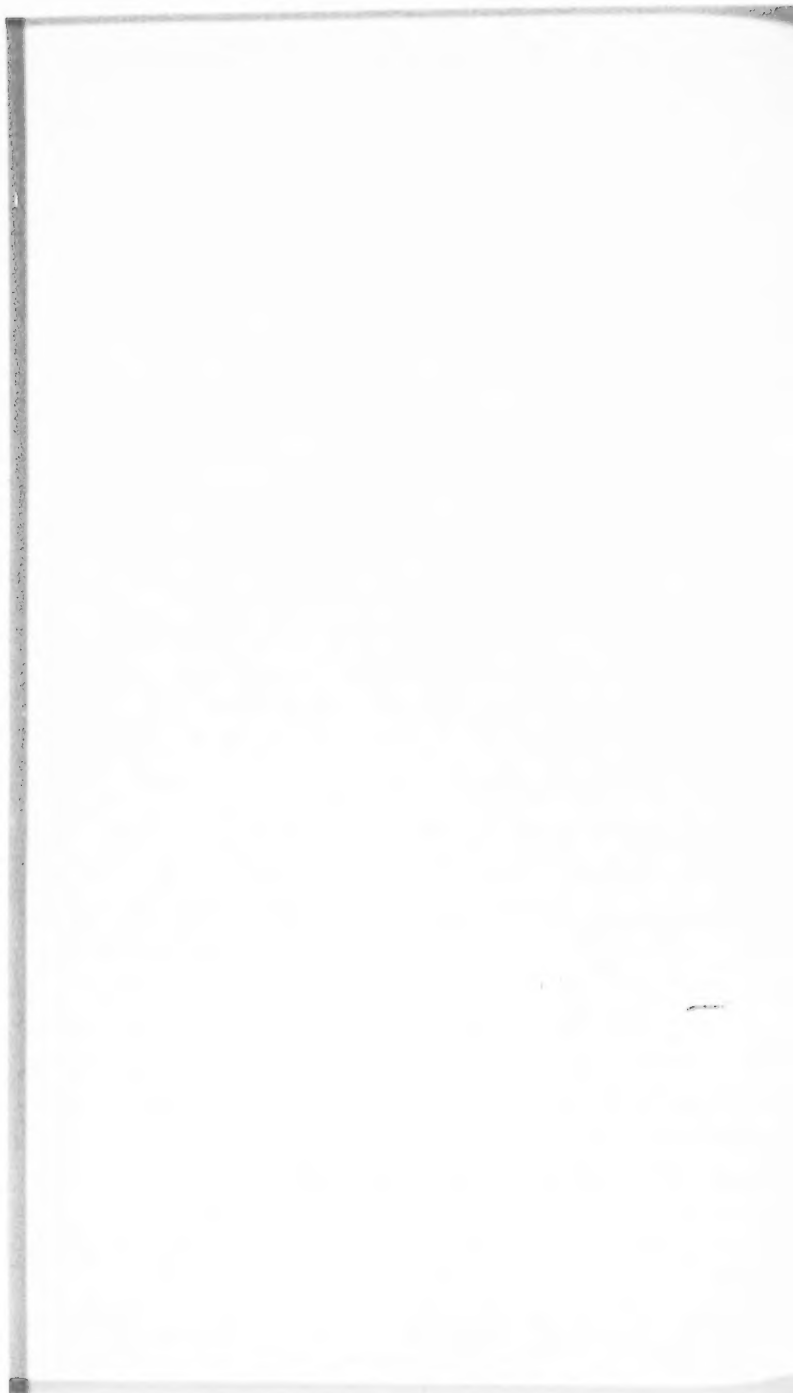
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# Supreme Court of the United States

OCTOBER TERM, 1923.

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THE STATE OF WASHINGTON,  
*Plaintiff in Error,*

VS.

W. C. DAWSON & COMPANY, a  
corporation,  
*Defendant in Error.*

No. ....

WRIT OF ERROR TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON.

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## BRIEF OF AMICUS CURIAE

### STATEMENT OF THE CASE

This action was brought by the state of Washington, the plaintiff in error, to collect premiums under the workmen's compensation act of the state of Washington from the defendant in error, a corporation which employs stevedores to stow away cargoes in ships lying upon the waters of Puget Sound, which are navigable waters of the United States within the boundaries of the state of Washington. This action directly calls in question the constitutionality of the act of Congress of June 10, 1922, amending sections 24 and 256 of the Judicial Code and saving to maritime claim-

ants (other than the master and the crew of a vessel) their rights and remedies under the workmen's compensation act of any state and depriving the federal district courts of jurisdiction in those cases. In holding that the trial court correctly sustained the demurrer to the complaint and, on refusal of the plaintiff to plead further, properly dismissed the action, the supreme court of the state of Washington ruled that the act of Congress was unconstitutional. *State of Washington v. W. C. Dawson & Co.*, 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059. The case is here on writ of error.

## ARGUMENT

The determination of this cause involves (1) the ascertainment of the true boundary line for state legislation in the field of admiralty apart from acts of Congress, as that line is at present established by the decisions of this Court, and (2) the power of Congress to enlarge the present sphere of state legislation in admiralty and maritime matters by withdrawing certain classes of cases from the jurisdiction of the district courts of the United States. While these questions may thus, for convenience be separately stated, the determination of the first is practically conclusive of the second.

In the case of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, this Court held unconstitutional an act of Congress saving to maritime suitors their remedies under the workmen's compensation act of any state. Since the decision in the case of *Knickerbocker Ice Co. v. Stewart*, this Court has made important decisions bearing on the issues here involved, in *Western Fuel Co. v. Garcia*, 257 U. S. 233; in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469; in *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263; and in *Great Lakes Dredge and Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, p. 490.

In the present case it cannot be seriously contended that the case of *Knickerbocker Ice Co. v.*

*Stewart*, 253 U. S. 149, is not controlling, unless that decision has in some way been impliedly modified by the decision in the case of *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, which is discussed at length in the briefs of both plaintiff in error and defendant in error. It is the contention of the plaintiff in error that the *Knickerbocker Ice Co.* case has been modified by the *Rohde* case to the extent of sustaining the act of Congress here involved. (See Brief of Plaintiff in Error, p. 15). Therefore, the ascertainment of the true principle of the *Rohde* case will be largely determinative of this action. The questions above propounded will now be discussed in their order.

# I.

THE BOUNDARY LINE FOR STATE LEGISLATION IN THE FIELD OF ADMIRALTY LAW, APART FROM ACTS OF CONGRESS, IS FIXED IN THE CASE OF *GRANT SMITH-PORTER SHIP CO. v. ROHDE*, 257 U. S. 469.

The boundary line for state legislation in the field of admiralty law, apart from acts of Congress, can best be fixed by the ascertainment of the true principle on which the *Rohde* case (257 U. S. 469) is based, because that case at the present time concededly constitutes the outpost of state jurisdiction.

*Rohde* was injured while working as a carpenter on an uncompleted ship which had just

been launched in the navigable waters of the Willamette River at Portland, Oregon. Rohde began an action in the United States district court for the district of Oregon, sitting in admiralty, to recover damages for the negligence of the Grant Smith-Porter Ship Company. The Oregon Workmen's Compensation Act applied to hazardous occupations, including shipbuilding within the state of Oregon and prescribed the exclusive remedy for injuries sustained in such occupations. The Ship Company interposed the compensation statute as a defense, but the defense was not allowed (259 Fed. 304; 263 Fed. 304), and Rohde recovered judgment. When the case reached the Circuit Court of Appeals for the Ninth Circuit, it certified to the United States Supreme Court two questions, which as construed by the Supreme Court are as follows: (1) "Whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state"; (2) "whether, in the circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court, which otherwise would exist." Both questions were answered by the Supreme Court of the United States in the affirmative, with the result, of course, that Rohde's recovery in the federal district court was

set aside, and he was obliged to take his award under the compensation act.

(A) THE ROHDE CASE ANNOUNCES THE PRINCIPLE THAT THE STATES MAY LEGISLATE AS TO LOCAL MATTERS IN THE FIELD OF ADMIRALTY LAW.

The *Rohde* case (257 U. S. 469, 66 L. Ed. 321) is not based on the so-called elective or contractual feature of the Oregon compensation act, as seems to be contended by the defendant in error (See Brief of Defendant in Error, pp. 16-17), but rests squarely on the *principle* that, while state legislation may not affect admiralty jurisdiction as to matters characteristically maritime, still *state legislation may affect admiralty jurisdiction as to local matters*. That *principle* is expressly enunciated in the *Rohde* case itself, the court saying as follows (66 L. Ed. 321, 324) :

"In *Western Fuel Co. v. Garcia* we recently pointed out, that *as to certain local matters*, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by *state statutes*. *The present case is controlled by that principle.*" (Italics ours).

There we have an unqualified statement of the *principle* controlling the *Rohde* case, viz., that *state statutes* may modify or supplement the general admiralty law as to certain *local matters*.

The *principle* on which the *Rohde* case is based reaches far back into the history of American admiralty law. See *Cooley v. Port Wardens*, (1851) 12 How. (U. S.) 299, 13 L. Ed. 996. It is fully discussed in the opposing opinions of Justice McReynolds for the majority and Holmes and Pitney for the dissenting justices in the leading case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205 61 L. Ed. 1086, 37 Sup. Ct. Rep. 524, L. R. A. 1918 C. 451, Ann. Cas. 1917 E. 900, the extent of that doctrine being the ground of the 5-4 division of the court in that case. Mr. Justice McReynolds, writing the majority opinion, recognized that the general maritime law

“may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied.”

The majority concluded, however, that the case before the court was beyond the scope of state legislation. The dissenting justices, after an exhaustive review of the authorities, took the view that the matter was within the power of the states.

In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 66 L. Ed. 210, the unanimous court, relying on the same cases as cited by the dissenting judges in *Southern Pacific v. Jensen*, *supra*, held that where death follows from a maritime tort committed on navigable waters within a state having a wrongful death statute, the federal courts, sitting

in admiralty (which, like the common law, knows no action for wrongful death), will entertain a libel *in personam* for the damages sustained from a wrongful death by those to whom such right is given. Mr. Justice McReynolds, who has written virtually all of the modern opinions on this question, said as follows (66 L. Ed. 210, 213):

“How far this rule of non-liability adopted and enforced by our admiralty courts in the absence of an applicable statute, may be modified changed or supplemented by state legislation has been the subject of consideration here, but no complete solution of the question has been announced.”

Then after a review of the United States Supreme Court cases permitting state legislation as to maritime matters local in their nature, he concludes (66 L. Ed. 210, 214):

“The subject is *maritime and local* in character, and the specified modification of, or supplement to, the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.” (Italics ours).

The next case, decided only a month after *Western Fuel Co. v. Garcia*, is the *Rohde* case, where the court announces the *principle* of the



case in the language which has already been set out above, but which for the sake of historical continuity is here repeated:

"In *Western Fuel Co. v. Garcia*, we recently pointed out that, as to certain *local matters* regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. *The present case is controlled by that principle.*" (Italics ours).

That such is the true principle of the *Rohde* case is again pronounced in the later case of *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, 66 L. Ed. 933, where the court says (66 L. Ed. 933, 937):

"In *Grant Smith-Porter Ship Co. v. Rohde*, a carpenter proceeding in admiralty sought damages for injuries received while at work on a partially completed vessel lying in the Willamette River. The Oregon workmen's compensation law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable waters and the cause of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the work-

man's activities at the time had any direct relation to navigation or commerce. *It was essentially a local matter.*" (Italics ours).

In the still later, and very recent, case of *Great Lakes Dredge and Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, the court expresses the principle of the *Rohde* case as follows:

"In the cause last cited, neither Rohde's general employment, nor his activities has any direct relation to navigation or commerce; *the matter was purely local*, and we were of the opinion that application of the *state statute*, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity." (Italics ours).

Can there be any doubt, then, as to the *principle* on which the *Rohde* case was decided when that case expressly sets forth and declares the *principle* on which it is based, and when the later decisions confirm that principle, viz., that *state legislation may affect admiralty jurisdiction as to local matters* without impairing the essential uniformity of admiralty law?

The foregoing examination of the cases seems sufficient to demonstrate beyond contradiction that the *Rohde* case was not based on the *fortuitous and incidental circumstance* that the Oregon

compensation act was elective, but on the *principle* that the subject-matter, while perhaps maritime in so far as locality is concerned, was *local* in its nature and *not characteristically maritime* so as to affect the uniformity of the general admiralty law, and that it was, therefore, a fit subject for state legislation. Not only is the elective feature of the statute in the *Rohde* case not stressed in the case itself, but the later cases of *State Industrial Commission v. Nordenholt Corporation*, *supra*, and *Great Lakes Dredge and Dock Co. v. Kierejewski*, *supra*, both of which as above shown, restate the *principle* of the *Rhode* case, do not even mention the so-called elective characteristic of the Oregon act, which fact clearly shows that the *incidental feature* was of no moment in the formulation of the *principle* of the decision.

(B) THE SUBJECT-MATTER IN THE ROHDE CASE  
WAS LOCAL BECAUSE THE SERVICE, EMPLOYMENT,  
AND CONTRACT WAS NON-MARITIME.

Why was the subject-matter in the *Rohde* case *local* in its nature? The court gives its reasons therefor in these words (66 L. Ed. 321, 324):

“The *contract* for constructing the ‘Ahala’ was a non-maritime, and although the incomplete structure upon which the accident occurred was lying in navigable waters, neither Rohde’s *general employment*, nor his *activi-*

*ties* at the time had any direct relation to navigation or commerce." (*Italics ours*).

Then, by way of distinguishing the *Jensen* and other cases, the court continues (66 L. Ed. 321, 325):

"In each of them the *employment* or *contract* was *maritime* in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity." (*Italics ours*).

These quotations sufficiently show why the subject-matter in the *Rohde* case was *local*. It was local because, although the injury happened on navigable waters, the subject-matter, viz., the shipbuilding contract, the contract of employment, and the activities at the time, were entirely *non-maritime*.

That the nature of the contract, the employment, and the activities at the time are controlling factors in determining the existence of state jurisdiction in these cases has long been settled and is not an innovation of the *Rohde* case, although at first blush it might seem so.

In *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208, the court refused to say whether maritime locality alone, while indispensable, was the exclusive test of admiralty jurisdiction, saying (58 L. Ed. 1208, 1212, 1312):

"But the petitioners urge that the general

statements which we have cited with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character \* \* \*

"We do not find it necessary to enter upon this broad inquiry \* \* \* Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case, the wrong which was the subject of the suit, was, we think, of a maritime nature \* \* \*

The libellant was injured on a ship, lying in navigable waters, *and while he was engaged in the performance of a maritime service*. We entertain no doubt that the *service* in loading and stowing of a ship's cargo is of this character \* \* \* If *more* is required than the *locality* of the wrong in order to give the court jurisdiction, the relation of the wrong to *maritime service, to navigation, and to commerce* on navigable waters was quite sufficient." (Italics ours).

*In all subsequent cases arising on navigable waters the court, following the lead of this case, has looked not only at the locality of the injury, but also at the nature of the service, employment,*

*and contract and their relation to navigation and commerce.*

In *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 61, L. Ed. 1086, 1099, the court, in denying recovery under the state compensation act for the injury on navigable waters in that case, further found:

“The *work* of a stevedore, in which the deceased was engaging, is maritime in nature; his *employment* was a maritime contract; the injuries which he received were maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234, U. S. 52, 59, 60, 58 L. Ed. 1208, 1211, 1212, 51 L. R. A. N. S. 1157, 34 Sup. Ct. Rep. 733.” (Italics ours).

In *Chelentis v. Luckenbach*, 247 U. S. 372, 62 L. Ed. 1171, the court, after finding that the injury occurred on navigable waters, further found (62 L. Ed. 1171, 1176):

“The *work* about which petitioner was engaged is maritime in its nature; his *employment* was maritime; the injuries received were likewise maritime; and the parties’ rights and liabilities were matters clearly within admiralty jurisdiction. *AtlanticTransport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 58 L. Ed. 1208, 1211, 1212, 51 L. R. A. N. S.

1157, 34 Sup. Ct. Rep. 733." (Italics ours).

In the *Rohde* case, after describing the circumstances of the injury on an incompleated ship lying in navigable waters, the court stated:

"The *contract* for constructing the 'Ahala' was non-maritime, and although the incompleated structure upon which the accident occurred was lying in navigable waters, neither Rohde's *general employment*, nor his *activities at the time* had any *direct relation to navigation or commerce*." (Italics ours).

Then, by way of distinguishing the *Jensen* and other cases, the court further said in the *Rohde* case:

"In each of them the *employment and contract* was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity."

In *State Industrial Commission v. Nordenholt Corporation, supra* (259 U. S. 263, 66 L. Ed. 933), the court, speaking of the *Rohde* case, says:

"Neither the *general employment contracted for* nor the workman's *activities at the time* had any *direct relation to navigation or commerce*; it was essentially a local matter." (Italics ours).

In the most recent utterance of the court on this question (*Great Lakes Dredge & Dock Co. v.*

*Kierejewski, supra*, U. S. Adv. Ops., May 1, 1923, p. 490, it is again not alone the locality but the maritime nature of the service and employment, viz., repairing a complete vessel afloat (*The Jefferson*, 215 U. S. 130; *New Bedford Dry Dock Co. v. Purdy*, 258 U. S. 96), that is determinative of federal jurisdiction in the case. The court says:

“While performing *maritime service* to a complete vessel afloat, he [Kierejewski] came to his death upon navigable waters as the result of a tort there committed. \* \* \*

“In the last cause cited, neither Rohde’s *general employment, nor his activities* had any direct relation to navigation or commerce; *the matter was purely local*, and we were of the opinion that application of the state statute, as between the parties would not work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity.

“Here the circumstances are very different. *Not only* was the tort committed and effective on navigable waters, *but the rights and liabilities* of the parties are matters which have *direct relation to navigation and commerce.*” Citing the *Jensen* and other cases. (Italics ours).



In this latest case, decided but a few months ago, the court says that

"*not only* was the tort committed on navigable waters, *but* [the contract to repair a complete vessel afloat being maritime], the rights and liabilities of the parties are matters which have a direct relation to navigation and commerce."

Thus the rule of the *Imbrovek* case, *supra* (234 U. S. 52, 58 L. Ed. 1208), viz., that the nature of the service or employment and its relation whether direct or indirect, to navigation or commerce is a criterion as well as the locality of the injury, has been consistently carried through the cases. Can one, after thus seeing the determinative facts and statements of these leading cases placed in juxta-position, safely deny that the nature of the *contract*, the *employment*, and the general *activities* at the time are not controlling just as much as the locality of the injury on navigable waters? Although the court in the *Rohde* case has repeated the general doctrine that in contract matters admiralty jurisdiction depends on the nature of the transaction and in tort matters upon the locality, yet it is only what the court calls it, viz., a "*general doctrine*," and in each tort case arising on navigable waters since the *Imbrovek* case, the court has applied not only the general locality test, but has examined the nature of the *contract*, the *employ-*

ment, and the activities at the time, and their relation to navigation or commerce; and it will be observed that in each case arising on navigable waters it has been the nature of the contract, of the employment, or of the activities at the time that has been decisive.

It will be noticed that in *Great Lakes Dredge & Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops. May 1, 1923, page 490, the court in order to sustain federal jurisdiction was compelled to make a finding of maritime service and employment in addition to maritime locality. Only thus could the *Rohde* case be distinguished. While, therefore, in the *Imbrovek* case the finding of maritime <sup>employment</sup> ~~locality~~ may have been in a sense voluntary in order to bring the case indisputably within the prior cases and "clearly within admiralty jurisdiction" without deciding whether it was necessary to do so or not, still in the *Great Lakes Dredge & Dock Co. v. Kierejewski* that finding became an absolute necessity to prevent the attaching of state jurisdiction under the *Rohde* case. In the *Imbrovek* case, and the subsequent cases heretofore referred to, the finding of the character of service or employment was made in order to show that the case was "clearly within admiralty jurisdiction"; in the *Rohde* case that finding became a ground of distinction for the purpose of sustaining state jurisdiction; and in the *Kierejewski* case that finding became an

absolute necessity to sustain federal jurisdiction as opposed to state jurisdiction under the *Rohde* case.

The case of *State Industrial Commission v. Nordenholdt Corporation*, 259 U. S. 263, emphasizes the distinction made in the *Imbrovek* case, to-wit, that locality, while indispensable, is not the exclusive test of federal jurisdiction. In the *Nordenholdt* case the injury occurred on land during the performance of a *maritime service*. It was held that the state compensation act applied. It is, of course, plain that federal jurisdiction could not attach for the reason that the indispensable element of locality on navigable waters was missing. *Imbrovek* case.

So far as workmen's compensation acts are concerned, there can be no question now since the decisions in the *Rohde* and *Kierejewski* cases that for an action to be triable in the federal courts, two things must concur: (1) maritime locality, (2) maritime service, employment or contract. If the locality is maritime, but the service is non-maritime, the matter is local and state compensation act applies under the doctrine of the *Rohde* case.

The present state of the law, then, on the relation of state workmen's compensation acts to admiralty law, reveals the following four situations:

- (1) Where the injury occurs on *navigable*

*waters* in the performance of a *maritime service, employment, or contract*, the state compensation act cannot apply because the injury directly affects the uniformity of admiralty law. See

*Southern Pac. Co. v. Jensen*, 244 U. S. 205;

*Great Lakes Dredge & Dock Co. v. Kierejewski*, U. S. Adv. Ops., May 1, 1923, p. 490.

(2) Where an injury occurs on *navigable waters* in the performance of a *non-maritime service, employment, or contract*, the state compensation act may apply, because the matter is a local matter and the injury only incidentally affects the uniformity of admiralty law. See

*Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469.

(3) Where an injury occurs on *land* during the performance of a *maritime service, employment, or contract* the state workmen's compensation act applies, because in that locus there is no possible conflict with admiralty law, since the element of locality on navigable waters which under the *Imbrokek* case is indispensable to federal jurisdiction, is missing. See

*State Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263.

(4) Where an injury occurs on *land* in the performance of a *non-maritime service, employment, or contract* the state compensation act ap-

plies, because such cases are always concededly within state jurisdiction.

It must be borne in mind that the struggle in recent years has constantly been to extend the jurisdiction of state compensation acts into the field of admiralty, and that thus far this effort has been successful only as to local matters where admiralty is incidentally affected. See

*Southern Pac. Co. v. Jensen*, 244 U. S. 205;

*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149;

*Western Fuel Co. v. Garcia*, 257 U. S. 233;

*Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469.

(C) THE ROHDE CASE DOES NOT AND CANNOT REST ON THE ALLEGED CONTRACTUAL FEATURE OF THE OREGON COMPENSATION ACT.

It remains to notice the argument of the defendant in error that the *Rohde* case is based upon the so-called elective feature of the Oregon compensation act, and that under a so-called compulsory compensation act, such as the Washington act, a different result must obtain.

This contention is erroneous for three reasons:

(1) all the subsequent cases in this court which restate the principle on which the *Rohde* case is decided, do not even mention the so-called elec-

tive characteristic of the Oregon statute, but refer only to the nature of the service, employment, and contract; (2) parties cannot by contract extend the jurisdiction of a court or the scope of a statute; and (3) there is no inherent difference between a so-called "elective" and so-called compulsory compensation act, for the reason that in a so-called "elective" act all the elements of compensation are present and the elements of voluntary contract absent.

(1) *All Subsequent Cases in This Court Which Restate the Principle on Which the Rohde Case Was Decided Do Not Mention the So-called Elective Feature of the Oregon Act.*  
*feature of the Oregon act.*

Not only is the elective feature not stressed in the *Rohde* case itself, but the later cases of *State Industrial Commission v. Nordenholdt Corporation, supra*, and *Great Lakes Dredge & Dock Co. v. Kierejewski, supra*, both of which, as above shown, restate the principle of the *Rohde* case, do not even mention the so-called elective characteristic of the Oregon act, which fact clearly shows that that *incidental feature* was of no moment in the formulation of the *principle* of the decision. These subsequent cases discuss only the character of the service, employment and contract.

(2) *Parties Cannot by Contract Extend the Jurisdiction of a Court or the Scope of a State.*

Second, parties cannot by contract extend the jurisdiction of a court or the scope of a statute to a situation or locality which, in the absence of the contract, would not be within the jurisdiction of the court or the scope of the statute.

*Re Winn*, 213 U. S. 458, 53 L. Ed. 873;

*U. S. v. Mayer*, 235 U. S. 55, 59 L. Ed. 129;

7 R. C. L. 1039;

15 C. J. 802.

This being the universal doctrine, the *Rohde* case cannot rest on the proposition that by contract the parties extended the scope of the statute to a situation and a subject-matter which, apart from contract, would not have been covered by the statute. The Oregon legislature extended the scope of the statute to include the situation by placing shipbuilding operations under the act, and the parties merely came within the existing scope as delineated by the legislature.

The argument that there is a ground for distinguishing the *Rohde* case because of the so-called elective feature of the Oregon statute has already been refuted in a recent decision of the supreme court of the state of Washington. *Zahler v. Department of Labor and Industries*, 217 Pac. 55. In that case the facts were for all practical purposes identical with the facts in the *Rohde* case and the Washington court was

squarely faced with the question whether the alleged difference between a so-called elective and a so-called compulsory compensation act compelled a different result on a like state of facts. In an exhaustive opinion the court concluded that on principle the result must be the same, although in order to reach this result the court changed the view it had theretofore taken of the *Rohde* case in its decision in *State of Washington v. W. C. Dawson & Co.*, 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059, which is the present case below.

The defendant in error argues that Rohde was allowed to recover under the state act because he had contracted away his right to proceed in the federal court in admiralty. The defendant in error says (Brief p. 17):

“Under this implied contract Rohde in effect agreed not to bring any suit in the district court or in any other court, for the recovery of damages which he might sustain, but on the contrary to content himself with such an award as might be given by the state compensation officials.”

The answer to this argument is that the mere alleged ~~contract~~ agreement of the workman to give up a right to sue in admiralty would still not bring him within the scope of the compensation act, unless, independently of the alleged agreement, the compensation act applied to the



situation. And if the statute applies to the situation (a local matter by reason of the non-maritime character of service and employment), then it makes no difference whether the statute is a so-called elective or so-called compulsory act; in either case its exclusive feature would bar the remedy in admiralty.

The supreme court of the state of Washington recognizes the fallacy of the foregoing argument of the defendant in error in the following terms (*Zahler v. Department of Labor and Industries*, 217 Pac. 55, 60):

“Some contention is made that the language of the decision in the *Rohde* case, above quoted, lends support to the view that it was rested wholly upon the nature of the contract between Rohde and his employer, apart from the nature of the employment; that is, that their contract being made with reference to the Oregon workmen’s compensation law, the contract became the sole source and support of the employer’s contention that Rohde had no right of recovery in the courts.

“If this argument be sound, then the contract of employment could be rendered effective to destroy Rohde’s right of recovery in admiralty and confer jurisdiction upon a state tribunal, even if Rohde’s employment had been of such a pure maritime nature

as to make the admiralty jurisdiction over the question of his right to recover for injury exclusive; that is, the contract would in effect confer jurisdiction upon a state tribunal which would have no jurisdiction over the subject matter. \* \* \* We think it hardly possible that the court intended to hold that Rohde and his employer could, by their contract alone, effectually confer jurisdiction over the subject matter in question upon the state tribunal, nor even by their contract submit their persons to the jurisdiction of the state tribunal unless the state tribunal did in fact have by law jurisdiction over the subject-matter; \* \* \*

This elementary doctrine that consent cannot confer jurisdiction is once more laid down in the recent case of *Panama R. Co. v. Johnson*, 289 Fed. 964, 982, where the circuit court of appeals for the second circuit says:

“Where a court has no jurisdiction of the subject-matter, it cannot be conferred by consent of the parties.”

Citing a number of United States Supreme Court decisions.

The argument that the federal courts are deprived of jurisdiction *by private contract* is fully answered by the foregoing. But it may be said in addition that that argument clashes with the elementary rule that parties cannot by private

contract oust courts of jurisdiction, and that ousting the federal court of jurisdiction in the *Rohde* case was not based on the *contract* but on the *statute*.

"The *statute of the state applies* and defines the rights and liabilities of the parties." (*Rohde* case, 66 L. Ed. 321, 324).

If the federal court had jurisdiction, *Rohde* might sue there notwithstanding any private contract to the contrary; but otherwise, if a statute prevented his doing so. It was for the reason that the *statute* applied that the court said,

"\* \* \* he cannot recover damages in an admiralty court" (66 L. Ed. 321, 325).

The argument of the defendant in error on the *Rohde* case may be summarized as follows: The federal court, which *has* jurisdiction of the subject-matter, is by *private contract ousted* of jurisdiction; and by that same *private contract* jurisdiction is conferred upon the body administering the Oregon state compensation act, although in the absence of that private contract it has no jurisdiction over the subject-matter, nor does the legislature have the power to give it such jurisdiction. In other words, the defendant in error argues that the parties can do to the general admiralty law by private contract what the legislature cannot do, although the latter attempted to put shipbuilding under the compensation act.

It will be agreed that if that is the law, viz., if the *Rohde* case overrules the two immemorial rules of law (1) that a court cannot be ousted of jurisdiction by private contract, and (2) that consent of the parties cannot confer jurisdiction on a tribunal which, in the absence of the consent, has no jurisdiction over the subject-matter,—if that is the law of the *Rohde* case, then it will be agreed that the Supreme Court of the United States has, *without mention*, stricken from the books two fundamental doctrines.

On the contrary, it is clear that the *Rohde* case rests squarely on the *principle* expressly announced in it and restated in the later decisions (66 L. Ed. 321, 324):

“that as to certain *local matters*, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state *statutes*. *The present case is controlled by that principle*. The *statute* of the state *applies* and defines the rights and liabilities of the parties.” (Italics ours).

The court does *not* say, it is to be noted, that as to certain *local matters* the rules of the general maritime law may be modified by “private contract,” but by “state statutes.” Moreover, the court does not say that the *private contract* “applies and defines the rights and liabilities of the parties,” but that “the *statute* of the state

applies and defines the rights and liabilities of the parties." In other words, it was within the power of the Oregon legislature to put ship-building, a *non-maritime* industry, under the compensation act, and, therefore, that act applied to the situation.

(3) *There is no Inherent Distinction Between a So-called Elective and So-called Compulsory Compensation Act, for the Reason That in a So-called Elective Act, the Elements of Compulsion Are Present and the Elements of Voluntary Contract Absent.*

In the third place, assuming for the moment that parties might voluntarily contract to extend the jurisdiction of a court or of a statute, the parties under a so-called elective compensation statute do not voluntarily contract, but the statute is imposed upon them in case they do not, within a specified time, affirmatively express their intention to stay out of the operation of the statute; and staying out from under the statute is burdened with such heavy penalties that the parties are, in practical effect, compelled to come within the statute. *This they do by merely maintaining silence and not by consciously contracting.* In other words, calling these statutes "elective" is a misnomer, for in their practical operation they are just as compulsory as the so-called compulsory statutes. For this reason no distinction should be made on the

basis of whether the statute is called elective or compulsory. Bearing out this statement, it is said in 35 Harvard Law Review 745 (April, 1922):

"Should a distinction be made where this incident is voluntarily assumed under an elective, and where it is imposed under a compulsory statute. It is arguable that under the former type of statute, the state has not changed admiralty law, but the parties have themselves voluntarily relinquished maritime rights and remedies and substituted those provided by statute. But the argument that there has been no interference by the state is considerably weakened not only by the fact that usually the parties are bound unless there is an affirmative rejection, but especially by the fact that the statutes provide as an alternative to acceptance by the employer a threatened deprivation of defenses, to some of which he is clearly entitled by admiralty law. At any rate the courts have regarded as immaterial the fact that the statute is elective rather than compulsory. Nor did the court lay stress on the elective feature of the statute in the *Rohde* case. This as a possible distinction between it and the *Jensen* case must therefore be discarded. \* \* \*

And to the same general effect is the follow-

ing quotation from 7 Minnesota Law Review 49, 51 (December, 1922):

“An examination of the latter (elective compensation acts) shows that under most of them the parties are subject to their terms, unless they affirmatively reject them, and further, that, as an alternative to acceptance, the employer is threatened with a deprivation of his common law defenses of negligence of a fellow-servant, contributory negligence, and assumption of risk. In view of this, it hardly seems proper to say that the compensation provisions read into a contract of employment by the ‘elective’ acts constitute a contract between the parties, for a contract pre-supposes the right to exercise a free will. It would seem that what does happen is the creation of a legal obligation under certain circumstances, at most, a contract implied in law. If this be granted, then it follows irresistibly that the act can never be applied to vary the rights and liabilities that are definitely fixed by maritime law, whose uniformity is essential, because state law cannot contravene any superior maritime law. In short, the provisions of a compensation act, be it elective or compulsory, can never be read into a maritime contract.”

Such being the theory of the so-called elective

statutes, the *Rohde* case cannot possibly be based on a voluntary contract conferring jurisdiction because there could, under the theory of the act, be no conscious voluntary contract with reference to the scope of the statute. At best, there was a contract implied in law, in other words, the injection of the statute into every contract of employment governed by it; and, of course, the statute could not be injected into the contract of employment in any greater or lesser scope than that given the statute by the legislature.

It is clear, of course, that wherever the *Rohde* case speaks of the contract of the parties, it means the voluntary express *contract of employment*, as distinguished from the implied obligation imposed by the compensation statute. Thus the words:

"Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rule of the sea whose uniformity is essential \* \* \*"

apply as well to a *contract of employment* made with reference to a compulsory statute as one made with reference to an elective statute.

This concludes the discussion of the *Rohde* case. That case fixes the boundary line for state jurisdiction apart from acts of Congress, and estab-



lishes the principle that the states may legislate as to local matters in the field of admiralty law. It only remains to ascertain whether Congress can enlarge the power of the states beyond the limitations of that decision.

## II.

CONGRESS HAS NO POWER TO ENLARGE THE PRESENT SPHERE OF STATE LEGISLATION IN ADMIRALTY MATTERS BY WITHDRAWING CERTAIN CLASSES OF CASES FROM THE JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

From the foregoing discussion of the *Rohde* case it is apparent that the decision in that case does not in the slightest modify the rule of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. The decision in the *Rohde* case merely places *non-maritime* employments performed on navigable waters, under state compensation acts. In the *Knickerbocker Ice Co.* case the attempt was made by Congress to place *maritime employments* on navigable waters under state compensation acts, and this court held that Congress was powerless to do so. The case of *Knickerbocker Ice Co. v. Stewart*, *supra*, rests upon the doctrine of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, this Court saying (64 L. Ed. 834, 840):

“\* \* \* Congress undertook \* \* \* to save such statutes from the objections pointed

out by *Southern P. Co. v. Jensen*. It sought to sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees *engaged in maritime work*.

"And so construed, we think, the enactment is beyond the power of Congress."  
(Italics ours).

The *Jensen* case was reaffirmed by a unanimous court in *Great Lakes Dredge & Dock Co. v. Kierejewski*, decided April 9, 1923, U. S. Adv. Ops., May 1, 1923, p. 490.

In the present action it is sought to collect industrial insurance premiums from the employers of workmen *engaged in maritime employment on navigable waters*. So long as the *Jensen* case and the *Knickerbocker Ice Co.* case are the law, that cannot be done.

In the act of June 10, 1922, amending sections 24 and 256 of the judicial code, Congress attempts to save to maritime claimants (other than the master and the crew) their rights and remedies under the workmen's compensation act of any state by depriving the lower federal courts of jurisdiction in those cases. That this is an attempt by Congress to delegate to the states a power which this court in the *Knickerbocker Ice Co.* case held Congress could not delegate is ap-

parent. If the states do not have original power, as decided in the *Jensen* case, and if Congress cannot delegate the power, as decided in the *Knickerbocker Ice Co.* case, then the states cannot exercise a power which they have not and cannot obtain, even though the federal government has attempted to withdraw from the field. Moreover, that Congress cannot withdraw the federal government from the field by the attempted device of depriving the lower federal courts of a maritime jurisdiction which they derive, not from Congress but from the Constitution (U. S. Const., Art. III, section 2), seems apparent. And, in addition to the supreme court of the state of Washington in this case, the lower federal courts so bold.

*Farrell v. Waterman S. S. Co.*, 286 Fed. 284;

*Farrell v. Waterman S. S. Co.*, 291 Fed. 604;

*The Canadian Farmer*, 290 Fed. 601.

Respectfully submitted,

ALFRED J. SCHWEPPE,

*Amicus Curiae.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 366 and 684.—OCTOBER TERM, 1923.

The State of Washington, Plaintiff in Error, 366 vs. W. C. Dawson & Co.	}	In Error to the Supreme Court of the State of Washington.
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Industrial Accident Commission of the State of California and Joseph Hayes, Thomas Hayes, et al., etc., Plaintiffs in Error, 684 vs. James Rolph Company and General Accident, Fire and Life Assurance Corporation, Limited.	}	In Error to the Supreme Court of the State of California.
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[February 25, 1924.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

These causes turn upon the same point, were heard together and it will be convenient to decide them by one opinion.

The immediate question presented by number three hundred sixty-six is whether one engaged in the business of stevedoring, whose employees work only on board ships in the navigable waters of Puget Sound, can be compelled to contribute to the accident fund provided for by the Workmen's Compensation Act of Washington. The State maintains that the objections to such requirement pointed out in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, were removed by the Act of June 10, 1922, ch. 216, 42 Stats. 634.<sup>1</sup> It's Supreme Court ruled otherwise. 122 Wash. 572, 582.

<sup>1</sup>That clause 3 of section 24 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of

In number six hundred eighty-four the Supreme Court of California approved the conclusion of the Supreme Court of Washington and declared the Act of June 10, 1922, went beyond the power of Congress. It accordingly held the Industrial Accident Commission had no jurisdiction to award compensation for the death of a workman killed while actually engaged at maritime work, under maritime contract, upon a vessel moored at her dock in San Francisco Bay and discharging her cargo. — Calif. —.

The judgments below must be affirmed; the doctrine of *Knickerbocker Ice Co. v. Stewart*, to which we adhere, permits no other conclusion. There we construed the Act of October 6, 1917, ch. 97, 40 Stats. 395,<sup>2</sup> which undertook to amend the provision of sections

any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: *Provided*, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States."

Sec. 2. That clause 3 of section 256 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States."

<sup>2</sup>That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"Third: Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State."

24 and 256, Judicial Code, which saves to suitors in all civil causes of admiralty and maritime jurisdiction "the right of a common-law remedy where the common law is competent to give it," by adding the words "*and to claimants the rights and remedies under the workmen's compensation law of any State.*" After declaring the true meaning and purpose of the Act, we held it beyond the power of Congress.

Except as to the master and members of the crew, the Act of 1922 must be read as undertaking to permit application of the workmen's compensation laws of the several States to injuries within the admiralty and maritime jurisdiction substantially as provided by the Act of 1917. The exception of master and crew is wholly insufficient to meet the objections to such enactments heretofore often pointed out. Manifestly, the proviso which denies jurisdiction to district courts of the United States over causes arising out of the injuries specified was intended to supplement the provision covering rights and remedies under State compensation laws. As that provision is ineffective, so is the proviso. To hold otherwise would bring about an unfortunate condition wholly outside the legislative intent.

Counsel insist that later conclusions of this Court have modified the doctrine of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co. v. Stewart*. They rely especially upon *Western Fuel Co. v. Garcia*, 257 U. S. 233, *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, and *Industrial Commission v. Nordenholt Co.*, 259 U. S. 263.

*Southern Pacific Co. v. Jensen* involved a claim under the New York Compensation Act for death resulting from injuries sustained while the deceased was on board and engaged in unloading the vessel. We held (pp. 216, 217)—"It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied. . . . Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or inter-

feres with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. . . . The work of a stevedore, in which the deceased was engaging, is maritime in nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60. If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed."

In *Knickerbocker Ice Co. v. Stewart* (pp. 163, 164, 166), where claim was made under the New York Act on account of the death of a bargeman who fell into the Hudson River and drowned, this was said—

"We conclude that [by the Act of October 6, 1917] Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

"And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The

definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

“Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson v. Industrial Accident Commission*, 188 Pac. Rep. 803.

“Congress cannot transfer its legislative power to the States—by nature this is non-delegable. . . .

“Here, we are concerned with a wholly different constitutional provision—one which for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.”

In *Western Fuel Co. v. Garcia*, a proceeding begun in admiralty to recover damages for death of a stevedore fatally injured while working in the hold of a vessel then anchored and discharging her cargo, we held (p. 242)—“As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right



is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

*Grant Smith-Porter Co. v. Rohde* was a proceeding in admiralty to recover damages from the ship-builder for injuries which the carpenter received while working on an unfinished vessel moored in the Willamette River at Portland, Oregon. "The contract for constructing 'The Ahala' was nonmaritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment nor his activities at that time had any direct relation to navigation or commerce." We held the matter was only of local concern and that to permit the rights and liabilities of the parties to be determined by the local law would not interfere with characteristic features of the general maritime rules. We also pointed out the conclusion was in entire accord with prior cases.

*Industrial Commission v. Nordenholt Co.* related to a claim based upon death which resulted from injuries received by the longshoreman while on the dock—a matter never within the admiralty jurisdiction. "Insana was injured upon the dock, an extension of the land (*Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316), and certainly, prior to the Workmen's Compensation Act, the employer's liability for damages would have depended upon the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant Federal rule concerning the master's liability for personal injuries received on land."

None of the later causes depart from the doctrine of *Southern Pacific Co. v. Jensen* and *Knickerbocker Ice Co. v. Stewart*, and, we think, the provisions of the Act of 1922 cannot be reconciled therewith.

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. *Knickerbocker Ice Co. v. Stewart*. Exercising another power—to regulate commerce—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22, 1908, ch. 149, 35 Stat. 65) and thereby abrogated conflicting local rules. *New York Central R. R. Co. v. Winfield*, 244 U. S. 147.

This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

*Affirmed.*

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Mr. Justice HOLMES. The reasoning of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and cases following it never has satisfied me and therefore I should have been glad to see a limit set to the principle. But I must leave it to those who think the principle right to say how far it extends.

# SUPREME COURT OF THE UNITED STATES.

Nos. 366 and 684.—OCTOBER TERM, 1923.

The State of Washington, Plaintiff in Error, 366 <i>vs.</i> W. C. Dawson & Co.	}	In Error to the Supreme Court of the State of Washington.
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Industrial Accident Commission of the State of California and Joseph Hayes, Thomas Hayes, et al., etc., Plaintiffs in Error, 684 <i>vs.</i> James Rolph Company and General Accident, Fire and Life Assurance Corporation, Limited.	}	In Error to the Supreme Court of the State of California.
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[February 25, 1924.]

Mr. Justice BRANDEIS, dissenting.

A concern, doing a general upholstering business in New York, directs one of its regular employees, resident there, to make repairs on a vessel lying alongside a New York dock. The ship, then temporarily out of commission, is owned and enrolled in New York, and when used is employed only within the State. While on the vessel engaged in making the repairs, the employee is injured without the fault of anyone and is disabled for life. A statute of New York provides that, in such a case, he and his dependents shall receive compensation out of funds which employers are obliged to provide. To such state legislation Congress has, in express terms, given its sanction. Under the rule announced by the Court, the Federal Constitution prohibits recovery.<sup>1</sup> If, perchance, the accident had occurred while the employee so engaged was on the dock,

<sup>1</sup>Compare *Peters v. Veasey*, 251 U. S. 121, a stevedore; also, *Morse Dry Dock & Repair Co. v. Danielson*, 235 N. Y. 439; certiorari denied, 262 U. S. 756; *Morse Dry Dock & Repair Co. v. Warren*, 235 N. Y. 445; certiorari denied,

the Constitution would permit recovery.<sup>2</sup> Or, if happily he had been killed and the accident had been due to the employer's negligence, recovery (which is provided for by another state statute) would likewise be permitted under the Constitution, even though the accident had occurred on board the vessel.<sup>3</sup>

The Constitution contains, of course, no provision which, in terms, deals, in any way, with the subject of workmen's compensation. The prohibition found by the Court rests solely upon a clause in Section 2 of Article III: "The judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction."<sup>4</sup> The conclusion that the state law violates the Constitution and that the consent of Congress cannot save it, is reached solely by a process of deduction. The chain of reasoning involved is a long one. The argument is that the grant of judicial power to the United States confers upon Congress, by implication, legislative power over the substantive maritime law; that this legislative power in Congress (while not necessarily exclusive) precludes state legislation which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations;" that there is a rule of the general maritime law by which an employer is not liable, except in

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262 U. S. 756; *Morse Dry Dock & Repair Co. v. Connelly*, 235 N. Y. 602; certiorari denied, 262 U. S. 756, all drydock employees. In *Industrial Accident Com. v. Zurich General Accident, etc., Co.*, 218 Pac. 563; certiorari denied Jan. 28, 1924, the injury occurred in connection with the operations of a harbor dredger, not engaged in commerce or navigation. In *Industrial Accident Com. v. Alaska Packing Association*, 218 Pac. 561; certiorari denied Jan. 28, 1924, the accident occurred on an Alaska fishing vessel while laid up for the winter at San Francisco, alongside the dock.

<sup>2</sup>*State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, a stevedore.

<sup>3</sup>*Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479, a member of the crew; *Western Fuel Co. v. Garcia*, 257 U. S. 233, a stevedore. See also *Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.

<sup>4</sup>Article I, sec. 8, confers upon Congress power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." The conclusion reached by the Court emphasises not the breadth of the congressional power, but the limitations upon it.

case of negligence, for an occupational injury occurring on board a vessel; that the rule applies whenever the vessel on which the injury occurs is afloat on navigable water, even if the vessel, made fast to a dock, is out of commission; that the rule applies to occupations which, like upholstering, are not in their nature inherently maritime; that the rule governs the relations not only of the ship and its owners to their employees, but also the relations of independent contractors to their employees who customarily work on land; that this rule is a characteristic feature of the general maritime law; that for a State to change the rule, even as applied to independent contractors doing work on craft moored to a dock, temporarily disabled, and normally employed wholly within the State, interferes with the proper harmony and uniformity of the general maritime law in its international and interstate relations; and that, hence, a statute of a State which provides that employers within it shall be liable to employees within it for occupational accidents occurring within it violates the Federal Constitution, notwithstanding the state statute is expressly sanctioned by Congress.

Such is the chain of reasoning. Every link of the chain is essential to the conclusion stated. If any link fails, the argument falls. Several of the links are, in my opinion, unfounded assumption which crumbles at the touch of reason. How can a law of New York, making a New York employer liable to a New York employee for every occupational injury occurring within the State, mar the proper harmony and uniformity of the assumed general maritime law in its interstate and international relations, when neither a ship, nor a ship owner, is the employer affected, even though the accident occurs on board a vessel on navigable waters? The relation of the independent contractor to his employee is a matter wholly of state concern. The employer's obligation to pay and the employee's right to receive compensation are not dependent upon any act or omission of the ship or of its owners. To impose upon such employer the obligation to make compensation in case of an occupational injury in no way affects the operation of the ship. Nor can it affect the ship owners in any respect, except as every other tax, direct or indirect, laid by a state or municipality may affect, by increasing the cost of living and of doing business, every one who has occasion to enter it and many who have not.<sup>5</sup> This is true

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<sup>5</sup>That the obligation to contribute to the compensation fund may be deemed a tax, see *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237.

of the application of the workmen's compensation law, whether the service rendered by the independent contractor is in its nature non-maritime, like upholstering, or is inherently maritime, like stevedoring. The requirement by the State is a regulation of the business of upholstering or stevedoring. It is not a regulation of shipping. It in no respect attempts to modify, or deal with, admiralty jurisdiction or procedure, or the substantive maritime law. It is but an exercise of the local police power.<sup>6</sup> To impose upon the independent employer the obligation to provide compensation for accidents occurring on a vessel in port, while the vessel is made fast to the dock, in fact, cannot conceivably interfere with the proper harmony and uniformity of the general maritime law in its international or interstate relations.

Moreover, it is not a characteristic feature of the general maritime law that the employer, in case of accident, is liable to an employee only for negligence. The characteristic feature is the very contrary. To one of the crew, the vessel and her owners are liable, even in the absence of negligence, for maintenance, care and wages, at least so long as the voyage is continued. To him, they are liable, also, even in the absence of negligence, for indemnity or damages, if the injury results from unseaworthiness of the ship, or from failure to supply and keep in order the proper appliances.<sup>7</sup> The legal rights, in case of accident to persons other than members of the crew, were not determined by the maritime law until recently. The admiralty court, instead of extending to these persons this characteristic feature, borrowed the rule of negligence from the common law courts, making modifications conformable to its views of justice.<sup>8</sup>

The mere fact that the accident is an incident of a maritime contract, and the service performed thereunder is inherently maritime, does not preclude the application of the workmen's compensation law. The stevedore can recover under the workmen's compensation law, if the injury happens to occur on land, although the contract of the stevedoring concern is confessedly a maritime

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<sup>6</sup>Compare *New York v. Miln*, 11 Pet. 102; *Hooper v. California*, 155 U. S. 648.

<sup>7</sup>*The Osceola*, 189 U. S. 158; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255.

<sup>8</sup>See *Atlantic Transport Co. v. Imbroke*, 234 U. S. 52; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221-2.

one; and the stevedore is employed in a maritime service quite as much while he is on the dock as after he crosses the gang-plank and enters the ship.<sup>9</sup> Underlying the whole chain of reasoning, by which the conclusion is reached that the state and federal statutes are unconstitutional, will be found the legally indefensible assumption that the liability under the workmen's compensation law is governed by the law of the locality in which the accident happened; that is, by the rule that in tort the test of admiralty jurisdiction is presence on navigable waters. There is no more reason why the mere fact that the injury occurs on navigable waters should make applicable the maritime law to liabilities arising under the workmen's compensation law, than that it should make the maritime law applicable, in such cases, to the liability under a general accident insurance policy. Tort is, in fact, not an element in the liability created by the workmen's compensation law.<sup>10</sup> On the contrary, the basis of this legislation is liability without fault. Nor does the workmen's compensation law create a status between employer and employee. It provides an incident to the employment which is often likened to a contractual obligation, even where the workmen's compensation law is not of the class called optional. It will hardly be contended that an act occurring beyond the geographical limits of a State cannot be made the basis for the creation of rights to be enjoyed or enforced within it. Workmen's compensation laws which provide for compensation for injuries occurring in States other than that of the residence of the employer and the employee are held constitutional.<sup>11</sup> Why should they not be deemed valid where they provide for accidents occurring within the State but upon navigable waters?

A further assumption is that Congress, which has power to make and to unmake the general maritime law, can have no voice in

<sup>9</sup>In my opinion, the state law, being sanctioned by Congress, is valid, also, as applied to accidents suffered in port by persons, other than the master or member of the crew, even if the persons injured are employees of the vessel or of the owners, and notwithstanding their occupations are inherently maritime, like stevedoring.

<sup>10</sup>See Ernest Angell, "Recovery Under Workmen's Compensation Acts for Injury Abroad," 31 Harv. L. Rev. 619, 620. See, also, 37 Harv. L. Rev. 375. Compare Pound, *Spirit of the Common Law* (1921), 30.

<sup>11</sup>*Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Calif. 26, 35-37, 39, 44, 45; 255 U. S. 445. Compare *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544; *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106. See Ernest Angell, *supra*, 31 Harv. L. Rev. 619, 628, 636.

determining which of its provisions require adaptation to peculiar local needs and as to which absolute uniformity is an essential of the proper harmony of international and interstate maritime relations. This assumption has no support in reason; and it is inconsistent (at least in principle) with the powers conferred upon Congress in other connections. The grant "of the . . . judicial power . . . to all cases of admiralty and maritime jurisdiction" is, surely, no broader in terms than the grant of power "to regulate commerce with foreign nations and among the several States." Yet as to commerce, Congress may, at least in large measure, determine whether uniformity of regulation is required or diversity is permissible.<sup>12</sup> Likewise, Congress is given exclusive power of legislation over its forts, arsenals, dockyards, and other needful places and buildings. But it may permit the diverse laws of the several States to govern the relations of men within them.<sup>13</sup> Congress has exclusive power to legislate concerning the Army and Navy of the United States, to declare war, to determine to what extent citizens shall aid in its prosecution, and how effective aid can best be secured. But state legislation directly affecting these subjects has been sustained.<sup>14</sup> In respect to bankruptcy, duties, imposts, excises and naturalization the Constitution prescribes uniformity. Still, the provision in the bankruptcy law giving effect to the divergent exemption laws of the several States was held valid.<sup>15</sup> Absolute uniformity in things maritime is confessedly not essential to the proper harmony of the maritime law in its interstate and international relations. This is illustrated both by the cases which hold constitutional state regulation of pilotage and liens created by state laws in aid of maritime contracts, and by those which hold that there are broad fields of maritime activity to which admiralty jurisdiction does not extend. A notable instance of the latter is the liability in tort for injuries inflicted by a ship to a dock, or to

<sup>12</sup>See *Southern Pacific v. Jensen*, 244 U. S. 205, 244-251; *Clark Distilling Co. v. Western Maryland R. R. Co.*, 242 U. S. 311; *In re Rahrer*, 140 U. S. 545, 564.

<sup>13</sup>Compare *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525; *Chicago & Pacific Ry. Co. v. McGlenn*, 114 U. S. 542; *Western Union Tel. Co. v. Chiles*, 214 U. S. 274; *Omachevarria v. Idaho*, 246 U. S. 343.

<sup>14</sup>*Gilbert v. Minnesota*, 254 U. S. 325. Compare *Moore v. Illinois*, 14 How. 13; *Halter v. Nebraska*, 205 U. S. 34.

<sup>15</sup>*Hanover National Bank v. Moyses*, 186 U. S. 181. See *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 168.



maritime workers on the dock engaged in the inherently maritime operation of stevedoring.<sup>16</sup>

The recent legislation of Congress seeks, in a statesmanlike manner, to limit the practical scope and effect of our decisions in *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, and later cases, by making them hereafter applicable only to the relations of the ship to her master and crew. To hold that Congress can effect this result by sanctioning the application of state workmen's compensation laws to accidents to any other class of employees occurring on the navigable waters of the State would not, in my judgment, require us to overrule any of these cases. It would require merely that we should limit the application of the rule therein announced, and that we should declare our disapproval of certain expressions used in the opinions. Such limitation of principles previously announced, and such express disapproval of *dicta*, are often necessary. It is an unavoidable incident of the search by courts of last resort for the true rule.<sup>17</sup> The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law.

If the Court is of opinion that this act of Congress is in necessary conflict with its recent decisions, those cases should be frankly overruled. The reasons for doing so are persuasive. Our experience in attempting to apply the rule, and helpful discussion by friends of the Court, have made it clear that the rule declared is legally unsound;<sup>18</sup> that it disturbs legal principles long es-

<sup>16</sup>See *Southern Pacific v. Jensen*, 244 U. S. 205, 219-220.

<sup>17</sup>Compare, *e. g.*, *Sonneborn Bros. v. Cureton*, 262 U. S. 506 qualifying *Texas Co. v. Brown*, 258 U. S. 466; *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Askren v. Continental Oil Co.*, 252 U. S. 444; *Standard Oil Co. v. Graves*, 249 U. S. 389, and *Baltimore & Ohio S. W. R. R. Co. v. Settle*, 260 U. S. 166, 173, overruling *dicta* in *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403.

<sup>18</sup>See Edgar Tremlett Fell, *Recent Problems in Admiralty Jurisdiction* (1922), 1-53; John Gorham Palfrey, "The Common Law Courts and the Law of the Sea," 36 *Harv. L. Rev.* 777; also, Vol. 31, p. 488; Vol. 34, p. 82; Vol. 35, p. 743; Vol. 37, p. 478; E. Merriek Dodd, Jr., "The New Doctrine of the Supremacy of Admiralty over the Common Law," 21 *Col. L. Rev.* 647; also, Vol. 17, p. 703; Vol. 20, p. 685; Frederic Cunningham, "Is Every County Court in the United States a Court of Admiralty?" 53 *Amer. L. Rev.*

tablished; and that if adhered to, it will make a serious addition to the classes of cases which this Court is required to review.<sup>19</sup> Experience and discussion have also made apparent how unfortunate are the results, economically and socially. It has, in part, frustrated a promising attempt to alleviate some of the misery, and remove some of the injustice, incident to the conduct of industry and commerce. These far-reaching and unfortunate results of the rule declared in *Southern Pacific Co. v. Jensen* cannot have been foreseen when the decision was rendered. If it is adhered to, appropriate legislative provision, urgently needed, cannot be made until another amendment of the Constitution shall have been adopted. For no federal workmen's compensation law could satisfy the varying and peculiar economic and social needs incident to the diversity of conditions in the several States.<sup>20</sup>

The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule

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749; "The Tables Turned—Lord Coke Demolished," 55 Amer. L. Rev. 685; J. Whitla Stinson, "Admiralty and Maritime Jurisdiction," 54 Amer. L. Rev. 908; Yale L. Journal, Vol. 27, pp. 255, 924; Vol. 28, pp. 281, 835; Vol. 29, p. 925; Mich. L. Rev., Vol. 15, p. 657; Vol. 16, p. 562; Vol. 18, p. 793; Calif. L. Rev., Vol. 6, p. 69; Vol. 8, p. 338; Vol. 10, p. 234; Minn. L. Rev., Vol. 2, p. 145; Vol. 4, p. 444; Vol. 6, p. 230; Southern L. Q. Vol. 2, p. 304; Vol. 3, p. 76; Francis J. MacIntyre, "Admiralty and the Workmen's Compensation Law," 5 Cornell L. Q. 275; 91 Central L. J. 43; 6 Ill. L. Q. 157; 3 Va. L. Reg. (n. s.) 290-296; 61 Amer. L. Reg. (n. s.) 42-45.

<sup>19</sup>By making the substantive maritime law the rule of decision in the common law courts exercising concurrent jurisdiction, the rule of *Southern Pacific Co. v. Jensen* introduces into every case in a state court involving maritime law, even if it is not affected by any state statute, a federal question which may be brought to this Court for review either by writ of error or by petition for a writ of certiorari. Compare *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 293-303; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290.

<sup>20</sup>Compare *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 169. See Andrew Furuseth, "Harbor Workers Are Not Seamen: An Essential Distinction in Compensation Legislation," 11 Am. Labor Leg. Rev. 139; T. V. O'Connor, "The Plight of the Longshoremen," *ibid.* p. 144; J. P. Coughlin, "Accident Protection for Ship Repairmen," *ibid.* p. 146; J. P. Chamberlain, "The Conflict of Jurisdiction in Compensation for Maritime Workers," *ibid.* p. 133; L. W. Hatch, "The 'Maritime' Twilight Zone from the Standpoint of Compensation Administration," *ibid.* 148; J. B. Andrews, "Legislative Program of Accident Compensation for 'Maritime' Workers," *ibid.* p. 152. See also, *ibid.* Vol. 10, pp. 117, 241; Vol. 12, pp. 53, 69, 103, 104.

of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has disregarded its admonition are many.<sup>21</sup> The existing admiralty jurisdiction rests, in large part, upon like action of the Court in *The Genesee Chief*, 12 How. 443, 456. In that case the Court overruled *The Thomas Jefferson*, 10 Wheat. 428, and *The Steamboat Orleans v. Phoebus*, 11 Pet. 175; and a doctrine declared by Mr. Justice Story with the concurrence of Chief Justice Marshall, and approved by Chancellor Kent, was abandoned when found to be erroneous, although it had been acted on for twenty-six years.

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<sup>21</sup>See *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, 659, overruling *Ex parte Wisner*, 203 U. S. 449; *Terral v. Burke Construction Co.*, 257 U. S. 529, 533, overruling *Doyle v. Continental Insurance Co.*, 94 U. S. 535 and *Security Mutual Life Insurance Co. v. Prewitt*, 202 U. S. 246; *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 25, and *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502, 518, overruling *Henry v. Dick Co.*, 224 U. S. 1; *United States v. Nice*, 241 U. S. 591, 601, overruling *Matter of Heff*, 197 U. S. 488; *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 601, overruling *Hylton v. United States*, 3 Dall. 171; *Roberts v. Lewis*, 153 U. S. 367, 379, overruling *Giles v. Little*, 104 U. S. 291; *Brenham v. German American Bank*, 144 U. S. 173, 187, overruling *Rogers v. Burlington*, 3 Wall. 654 and *Mitchell v. Burlington*, 4 Wall. 270; *Leisy v. Hardin*, 135 U. S. 100, 118, overruling *Pierce v. New Hampshire*, 5 How. 504; *Morgan v. United States*, 113 U. S. 476, 496, overruling *Texas v. White*, 7 Wall. 700; *Legal Tender Cases*, 12 Wall. 457, 553, overruling *Hepburn v. Griswold*, 8 Wall. 603.